SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 115

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION AT THE PORT OF SAN FRANCISCO, PETITIONER

vs.

LOI HOA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellant:

JOSEPH P. FALLON, Esq., Hearst Bldg., San Francisco, Calif.

For Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 18,897.

In the Matter of LOI HOA, No. 24,594/3–2 ex S. S. "TAIYO MARU," October 31, 1925, on Habeas Corpus.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of said Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition.
4. Minute order regarding Immigration Record.
5. Judgment and order dismissing order to show cause and denying petition for writ.
6. Notice of appeal.
7. Petition for appeal.

8. Assignment of errors.
9. Order allowing appeal.
10. Citation on appeal—original and copy.
11. Stipulation and order regarding Immigration Record.
12. Clerk's certificate.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Mar. 19, 1926. [1*]

[Title of Court and Cause.]

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable, the Southern Division of the United States District Court, for the Northern District of California, Second Division:

The petition of Louie Wah Ton respectfully shows: That your petitioner is a citizen of the United States and a resident of the State and Northern District of California; that Loi Hoa, the detained person, on whose behalf this petition is made, is a Chinese merchant possessing a Section 6 certificate as required by law and as such is entitled to enter the United States; that the said Loi Hoa, hereinafter in this petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration for the port of San Francisco at the Immigration Station at Angel Island, County

*Page number appearing at foot of page of original certified Transcript of Record.

of Marin, State and Northern District of California; that said imprisonment, detention, confinement and restraint are illegal and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions [2] of the Acts of Congress of May 6, 1882, July 5, 1884, November 3, 1893, and the Act of Congress of April 29, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7, 1904, which said Acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts, and that he, the said Commissioner, intends to deport the said Loi Hoa away from and out of the United States to the Republic of China on the SS. "Taiyo Maru," sailing from the port of San Francisco, February 2, 1926.

That the said Comissioner of Immigration claims that the said detained arrived at the port of San Francisco on or about October 31, 1925, #24,594/3-2 ex SS. "Taiyo Maru," and thereupon made application to enter the United States as a Section 6 Chinese merchant from Saigon, French Indio-China; that the application of the said detained to enter the United States as a Section 6 Chinese merchant was denied by a Board of Special Inquiry, and that an appeal was thereupon taken from the excluding decision of said Board of Special Inquiry to the Secretary of the Department of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is claimed by the said Commissioner that in

all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of said Board of Special Inquiry and said Secretary of Labor was taken and made by them in the proper exercise of the discretion committed to them by the statutes in such cases made and provided and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, upon his information and belief, alleges that the hearing and proceedings had herein and the action of the said Board of Special Inquiry and the action of said Secretary of Labor was and is in excess of the [3] authority committed to them by the statutes, and in this behalf your petitioner alleges:

That your petitioner is informed and believes, and therefore alleges the fact to be, that the sole ground for the excluding decision as set forth on the notice of dismissal of the appeal is as follows: "This appeal has been dismissed on the ground that the applicant has not submitted a Section 6 certificate issued by the Government to which he owes allegiance and of which he is a citizen or subject." That your petitioner alleges that the detained did present a Section 6 certificate in proper form, complying with all the requirements of the statute and contains all of the information required by law to be furnished in such cases; that said Section 6 certificate is in complete accord with Section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884, which provides as follows:

"That in order to the faithful execution of the provisions of this act, EVERY CHINESE PERSON, other than a laborer, *who may be entitled by said treaty or this act* to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, *or of such other foreign government of which* AT THE TIME, *such Chinese person shall be a subject,* in *each* case to be evidenced by a certificate issued *by such government.* * * *"

That the detained's Section 6 certificate was signed by the Chief of the Immigration Service and it appears in the body of said document that he "has been designated for that purpose by the government of Indo-China" and that the applicant (in the language of the statute) "has the permission of said government to go and reside within the territory of the United States after an investigation and verification by the United States in this country"; that said certificate, in addition thereto, is authenticated by the American Consul at Saigon, French-Indo-China, who certifies that "This certificate was originally signed by the Chief of the [4] Immigration Service of Cochin-China, delegated by the Governor-General of Indo-China to sign Chinese certificates in Cochin-China." That said Section 6 certificate so presented by the detained was the act and deed of the Indo-China government and as such entitled the detained under the law to the right of entry into the United States; that the denial of said right was

an error in the interpretation of the law, illegal and an abuse of discretion on the part of the aforesaid officials.

That all of the testimony taken and all orders and findings of said Board of Special Inquiry and said Secretary of Labor and all other documents, papers and proceedings in said matter of the application of Loi Hoa for admission to the United States are, as your petitioner is informed and believes and therefore alleges the fact to be, incorporated in the record of the application of said Loi Hoa for admission to the United States and are now in the possession of and subject to the control of said Secretary of Labor, and all of them are now inaccessible to your petitioner and the said detained; that said Secretary of Labor will not permit an inspection of said record nor allow a copy of the same to be made in order to be filed with and made a part of this petition.

That the said Loi Hoa, the detained person, has exhausted all his rights and remedies and has no further remedy before the Department of Labor, and that unless the writ of habeas corpus issue out of this court as prayed for herein, directed to John D. Nagle, Commissioner as aforesaid, in whose custody the body of said Loi Hoa is, said Loi Hoa will be deported from the United States to China without due process of law.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued by this Honorable Court, directed to and commanding said John D. Nagle, Commissioner of Immigration at the port of [5] San

Francisco, to have and produce the body of said detained person before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into, all to the end that said detained person may be permitted to enter the United States and go hence without day.

Dated January 18th, 1926.

JOSEPH P. FALLON,
Attorney for Petitioner.

State of California,
City and County of San Francisco,—ss.

Louie Wah Ton, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

LOUIE W. TON.

Subscribed and sworn to before me this 18th day of January, 1926.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 22, 1926. [6]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the verified petition of Louie Wah Ton, praying for the issuance of the writ of habeas corpus,—

IT IS ORDERED that John D. Nagle, as Commissioner of Immigration at the port of San Francisco, at Angel Island, be and appear before the above-entitled court, Department Number Two thereof, on Monday, the 1st day of Febry., 1926, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition be granted as prayed, and this at the hour of 10 o'clock A. M. of said day; and

IT IS FURTHER ORDERED that Loi Hoa be not removed from the jurisdiction of this Court until the further order of this Court; and

IT IS FURTHER ORDERED that a copy of this order be served upon said John D. Nagle, or such other person having the said Loi Hoa in custody.

Dated January 22, 1926.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jan. 22, 1926. [7]

[Title of Court and Cause.]

DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

Comes now the respondent, John D. Nagle, Commissioner of Immigration at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

GEO. J. HATFIELD,
United States Attorney.
ROBERT M. FORD,
Asst. United States Attorney.

[Endorsed]: Filed Feb. 23, 1926. [8]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 23d day of February, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 23, 1926—ORDER SUSTAINING DEMURRER, ETC.

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Counsel was present for respective parties. Respondent filed demurrer to petition and also presented Immigration Records as Respondent's Exhibits "A" and "B," and all parties consenting thereto, it is ordered that said Immigration Records be considered as part of original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted. After consideration had thereon, further ordered demurrer sustained and writ denied. [9]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, to JOHN D. NAGLE, Commissioner of Immigration, and to GEORGE J. HATFIELD, Esq., United States Attorney, His Attorney:

You, and each of you, will please take notice that Louie Wah Ton, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and en-

tered herein February 23, 1926, denying the petition for a writ or habeas corpus filed herein.

JOSEPH P. FALLON,
Attorney for Petitioner. [10]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Louie Wah Ton, the petitioner in the above-entitled matter, and respectfully shows:

That on the 23d day of February, 1926, a judgment and order was made by the above-entitled Court and entered herein denying a writ of habeas corpus in the above-entitled matter, and dismissing the petition of said petitioner for a writ of habeas corpus, in which said judgment and order certain errors were committed to the prejudice of the above-named Loi Hoa, which more fully appear by his assignment of errors filed herewith.

WHEREFORE, your petitioner prays that an appeal may be allowed to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that the Clerk of the above-entitled court be directed to make and prepare a transcript of all the papers, proceedings and record of the above-entitled matter and to transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, within the time allowed by law, and for an order that the execu-

tion of the warrant or deportation of said Loi Hoa be stayed pending this appeal.

JOSEPH P. FALLON,
Attorney for Petitioner. [11]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the petitioner, Louie Wah Ton, through his attorney, Joseph P. Fallon, Esq., and sets forth the errors he claims the above-entitled court committed in denying his petition for a writ of habeas corpus, as follows:

I.

That the Court erred in not granting the writ of habeas corpus and discharging the detained Loi Hoa from the custody of John D. Nagle, Commissioner of Immigration at the port of San Francisco.

II.

That the Court erred in not holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause as prayed for in the petition of Louis Wah Ton for a writ of habeas corpus.

III.

That the Court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus. [12]

IV.

That the Court erred in not holding that Loi Hoa

was or is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration at the port of San Francisco.

V.

That the Court erred in not holding that there was an abuse of discretion on the part of the Immigration officials in denying the said Loi Hoa the right to enter the United States.

VI.

That the Court erred in not holding that the hearing or hearings accorded the said Loi Hoa by the said Immigration officials was or were unfair.

VII.

That the Court erred in not holding that the Section Six certificate presented by the said Loi Hoa to the Immigration officials complies fully with all the requirements of Section 6 of the Act of 1882, as amended by the Act of July 5, 1884, 23 Stat. L. 125; that said certificate was issued by the proper authority and was visaed by the appropriate consular representative of the United States, and as such legally entitled the said Loi Hoa to right of entry into the United States.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court for the Northern District of California made, given and entered herein in the office of the Clerk of said Court on the 23d day of February, 1926, denying the petition for a writ of habeas corpus, be re-

versed and that the said Loi Hoa be restored to his liberty and go hence without day.

JOSEPH P. FALLON,
Attorney for Petitioner.

[Endorsed]: Filed Mar. 19, 1926. [13]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing to the above-entitled court that Louie Wah Ton, the petitioner herein, has this day filed and presented to the above court his petition praying for an order of this court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order of this court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor,—

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled court make and prepare a transcript of all the papers, proceedings and record in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals, for the Ninth Circuit within the time allowed by law; and

IT IS HEREBY FURTHER ORDERED that the execution of the warrant of deportation of said Loi Hoa be and the same is hereby stayed pending

this appeal and that the said Loi Hoa be not removed from the jurisdiction of this court pending this appeal.

Dated: March 19, 1926.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Mar. 19, 1926. [14]

[Title of Court and Cause.]

CITATION ON APPEAL (COPY).

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, and GEORGE J. HATFIELD, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Loi Hoa is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California, this 19 day of March, 1926.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Mar. 19, 1926. [15]

[Title of Court and Cause.]

STIPULATION AND ORDER RESPECTING WITHDRAWAL OF IMMIGRATION RECORD.

It is hereby stipulated and agreed by and between the attorney for the petitioner and appellant herein and the attorney for the respondent and appellee herein, that the original Immigration Record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the Clerk of the above-entitled court and filed with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, there to be considered as a part and parcel of the record on appeal in the above-entitled case, with the same force and effect as if embodied in the transcript of the record, and so certified to by the Clerk of the Court.

Dated: San Francisco, California, March 19, 1926.

JOSEPH P. FALLON,
Attorney for Petitioner and Appellant.
GEO. J. HATFIELD,
S.,
Attorney for Respondent and Appellee. [16]

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the Clerk of this Court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by this Court.

Dated: San Francisco, California, March 22, 1926.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Mar. 22, 1926. [17]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 17 pages, numbered from 1 to 17, inclusive, contain a full, true and correct transcript of the records and proceedings, in the matter of Loi Hoa, on Habeas

Corpus, No. 18,897, as the same now remain on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of three dollars and ninety cents ($3.90) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of March, 1926.

[Seal] WALTER B. MALING,
Clerk.

By ——————,
Deputy. [18]

[Title of Court and Cause.]

CITATION ON APPEAL (ORIGINAL).

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, and GEORGE J. HATFIELD, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office

of the United States District Court for the Northern District of California, wherein Loi Hoa is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California, this 19 day of March, 1926.

FRANK H. KERRIGAN,
United States District Judge. [19]

[Endorsed]: Filed Mar. 19, 1926. [20]

[Endorsed]: No. 4813. United States Circuit Court of Appeals for the Ninth Circuit. Loi Hoa, Appellant, vs. John D. Nagle, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed March 22, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

21 **[Minute entry of argument and submission, May 14, 1926, omitted in printing.]**

22 **In United States Circuit Court of Appeals, Ninth Circuit**

LOI HOA, APPELLANT vs. JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION AT the port of San Francisco, California, appellee	No. 4813
LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON, appellant vs. JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION AT the port of San Francisco, California, appellee	No. 4814

Order directing filing of opinion and filing and recording of decrees

(Filed June 1, 1926)

By direction of the Honorable William B. Gilbert, William H. Hunt, and Frank H. Rudkin, circuit judges, before whom the above-entitled causes were heard, ordered that the typewritten opinion this day rendered by this court in the above-entitled causes be forthwith filed by the clerk and that a decree be filed and entered in the minutes of this court in each of said causes in accordance with the opinion filed therein.

23 In United States Circuit Court of Appeals

No. 4813, No. 4814

Opinion

(Filed June 1, 1926)

Before Gilbert, Hunt, and Rudkin, circuit judges.

GILBERT, Circuit Judge:

24 These two appeals present the question of the right of Chinese merchants, citizens, and subjects of the Republic of China to enter the United States as such merchants under authority of certificates issued in regular form in compliance with section 6 of the act of May 6, 1882 (22 Stats. 58), as amended by the act of July 5, 1884 (23 Stats. 115); but made by a French official of French Indo-China at Saigon and not by an official or representative of the Republic of China, the applicants having been domiciled merchants for a number of years in Indo-China. Their right to enter the

United States was denied by a board of special inquiry, and on appeal to the Department of Labor the ruling was affirmed on the ground that the applicants were only residents and not naturalized citizens of Indo-China, and that the country to which they owed full and unqualified allegiance at the time of their coming to the United States is the country from which they must obtain their certificates. Section 6 of the act requires that a Chinese merchant on coming to the United States "shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government."

The solution of the question here involved depends upon the construction to be given to the word "subject" as used in the statute. The word may have a variant meaning in treaties or statutory enactments, according to the context and to the purpose intended to be subserved. Thus in Respublica v. Chapman, 1 Dallas 53, 60, it was held that it implies a subjection to some sovereign power, and means "one who owes obedience to the laws, and is entitled to partake of the elections into public office." But in The Pizarro, 2 Wheat. 227, 245, it was held that in a certain section of our treaty with Spain the words "subjects," "people," and "inhabitants" were "indiscriminately used as synonymous." The court said: "Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace." In Carlisle v. United States, 16 Wall. 147, 154, it was said: "The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence."

Appellants contend that the word "subject" as used in the exclusion act means one who is resident in or domiciled in "such other foreign" country, and they find support of that construction in the words "of which at the time." We think the contention must be sustained. The treaties with China and the statutes enacted in pursuance thereof were obviously intended only for the benefit of American citizens and Chinese subjects. To become subjects of Indo-China so as to owe allegiance to the government thereof these appellants would have been required to renounce their allegiance to the country in which they were born, and all rights which they theretofore had as subjects of China. We think it in-

conceivable that either by the United States or by China the benefits of the treaty here involved were intended to be extended to subjects of other nations.

This reasoning is rejected by the Department of Labor for the reason, it is said, "that Chinese may, if they so desire, become citizens or subjects of other nations by naturalization," and thus obtain certificates under section 6. But it is not to be supposed that in entering into the treaties with the United States the Chinese Government had in mind the protection of Chinese who had transferred their allegiance to other countries and had ceased to be Chinese subjects. This is denied by the very terms of the treaties. In the treaty of November 17, 1880, it was declared that the purpose thereof was to promote commercial relations "between the citizens and subjects of the two powers." And in the treaty of March 17, 1894, it was recited that the purpose was "to protect the citizens or subjects or each within the jurisdiction of the other." And it is significant as expressing the understanding of the high contracting parties that in that treaty, which was in force for a period of ten years, it was expressly provided that in order that Chinese merchants
27 and others of the favored class might be admitted to the United States, they might produce a certificate from their government, "or the government where they last resided."

The judgment in each case is reversed and the cause is remanded with instructions to issue the writ of habeas corpus as prayed for.

[File indorsement omitted.]

28 In United States Circuit Court of Appeals

No. 4813

Decree

Filed June 1, 1926

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

This cause came on to be heard on the transcript of the record from the Southern Division of the District Court of the United States for the Northern District of California, Second Division, and was duly submitted.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the judgment of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is, remanded to the said District Court with instructions to issue the writ of habeas corpus as prayed for.

[File indorsement omitted.]

29 **In United States Circuit Court of Appeals**

No. 4813, No. 4814

Order staying mandates

Filed July 29, 1926

Good cause therefor appearing, it is hereby ordered that the issuance of each of the mandates in the above-entitled causes be stayed to and including September 1, 1926.

Dated San Francisco, July 27, 1926.

WM. H. HUNT,
United States Circuit Judge.

[File indorsement omitted.]

30 [Clerk's certificate omitted in printing.]

31 Supreme Court of the United States

Order allowing certiorari

Filed November 23, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

O

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 116

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION AT THE PORT OF SAN FRANCISCO, PETITIONER

vs.

LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellant:

DION R. HOLM, Esq., Humboldt Bank Bldg., San Francisco, California.

For Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 18,908.

In the Matter of the Application of LAM YOUNG, for Writ of Habeas Corpus for and on Behalf of PHUONG CON.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Sir: Please issue certified copies of the following proceedings, etc.:

1. Petition for writ of habeas corpus.
2. Order to show cause therein.
3. Demurrer.
4. Order sustaining demurrer, denying petition and discharging order to show cause.
5. Notice of appeal.
6. Petition for appeal.
7. Order allowing appeal.

8. Assignment of errors.
9. Stipulation and order as to exhibits.
10. Substitution of attorneys.
11. Praecipe for appeal and all minute orders of Court except those of postponement.
12. Citation on appeal, original and copy.

DION R. HOLM,
Attorney for Appellants. [1*]

[Endorsed]: Receipt of a copy of the within praecipe for transcript of record is hereby admitted this 19 day of March, 1926.

GEO. J. HATFIELD,
S.,
U. S. Atty.

Filed May 19, 1926. [2]

[Title of Court and Cause.]

PETITION FOR WRIT OF HABEAS CORPUS.

I.

Phuong Con is a person of Chinese descent, thirty-one (31) years of age, and arrived at the port of San Francisco on the 18th day of November, 1925, and sought admission to the United States as a resident of Saigon, French Indo-China, and presented to the Commissioner of Immigration at Angel Island a "Section 6" certificate; that the said Section 6 certificate was issued to Phuong Con in accordance with the laws relating to the admis-

*Page number appearing at foot of page of original certified Transcript of Record.

sion of Chinese, Act of May 6, 1882, as amended and added to by the Act of July 5, 1884; that the said certificate issued in accordance with Section 6 of the said Act contained a visa of the American Consul at Saigon, Indo-China, and under his official seal the said American Consul certifies that he has made a thorough investigation of the statements contained in the said certificate and found them to be in all respects true. The said certificate shows on its face that the applicant has permission of the Indo-China Government to come to the United States; that the said certificate is printed in the English language, sets forth the name of Phuong Con which is the tribal name in full of the said Phuong Con; it also shows on its face the age, height and all physical peculiarities of the said Phuong Con, his former and present occupation and how long he had pursued the same as [3] of the date of issuance of the said certificate, which certificate was viseed by the American Consul on the 27th day of November, 1924, and the said certificate further sets forth the place of residence of the said Phuong Con. The said certificate sets forth that Phuong Con is and was a merchant, the nature and character and estimated value of the business carried on by him prior to and at the time of his application for said certificate.

II.

Proceedings were had before the Commissioner of Immigration at Angel Island on the 3d day of December, 1925, and on the 12th day of December, 1925, and on the former date, the board of special

inquiry conducting the hearing at Angel Island provisionally denied Phuong Con the right to enter the United States and on the latter date finally denied the said Phuong Con the right to enter the United States. The decision of the board of special inquiry was adopted by the Commissioner of Immigration at Angel Island on the 7th day of December, 1925, wherein in his findings, the said Commissioner of Immigration stated Phuong Con "has no status entitling him to admission." On the 12th day of December, 1925, the Commissioner of Immigration finally denied in writing the said Phuong Con the right to enter the United States. Thereafter and within the time provided by law, an appeal was perfected to the Secretary of Labor at Washington, D. C., and on the 3d day of February, 1926, the Commissioner of Immigration at Angel Island forwarded to Phuong Con's attorney, a notice that the appeal to the Secretary of Labor has been dismissed.

III.

Phuong Con is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagel, Commissioner of Immigration, who is the person who has the care, custody and control of the body of the said Phuong Con in the Immigration [4] Station of the United States at Angel Island, Bay of San Francisco, Northern District of California, and the said Phuong Con is about to be deported therefrom to China; that the unlawfulness and illegality of the imprisonment, detention, confinement and restraint of liberty of the said Phuong

Con consists in this: that arbitrarily and unfairly the Commissioner of Immigration and the Secretary of Labor denied Phuong Con the right to enter the United States and that the hearings conducted by the said Commissioner of Immigration at Angel Island consisted solely of the testimony of the said Phuong Con, which was in accord with the statements contained in his Section 6 certificate and that the said Commissioner of Immigration nor the Secretary of Labor, nor any other person introduced any evidence to controvert the testimony of the said Phuong Con. The said testimony conclusively shows that Phuong Con was a merchant for many years prior to his obtaining the said Section 6 certificate and that the business conducted by him in Indo-China was extensive; that the action of the Commissioner of Immigration and the Secretary of Labor violated the treaty between the United States and China as ratified between the two countries on the 19th day of July, 1881, in this, that the said Commissioner of Immigration and the Secretary of Labor did not give full or any recognition to the certificate issued under Section 6 of the laws relating to the admission of Chinese and which laws were passed for the purpose of giving full force and effect to the treaties between the two countries.

IV.

That the records of the Immigration Authorities at Angel Island and the proceedings of the Secretary of Labor at Washington, D. C., are not available to Phuong Con or to petitioner; that your affiant believes said records to be in transit from [5]

Washington and when the said records become available, prays leave to amend this petition by attaching hereto copies of the said proceedings.

V.

That Phuong Con is held incommunicado at Angel Island by the said Commissioner of Immigration and is unable to apply in person or sign this petition; that Lam Young is a friend of the said Phuong Con and makes this petition in his behalf; that all of the allegations contained in this petition are on information and belief but petitioner believes that said allegations are true.

WHEREFORE, petitioner prays that a writ of habeas corpus be issued by this Honorable Court directed to and commanding said John D. Nagel, Commissioner of Immigration at the port of San Francisco to have and produce the body of the said Phuong Con before this Honorable Court at the Post Office Building in the city and county of San Francisco, the day and time certain to be fixed by this Court, or to show cause, if any he has, why the writ should not be granted in order that the alleged cause of imprisonment and detention of said Phuong Con may be examined into so that if it be determined the said detention and imprisonment is unlawful and illegal, or that Phuong Con was not given a fair hearing, that the said Phuong Con may be discharged from the custody, detention and imprisonment; that a copy of this petition be served upon the United States Attorney and a copy of the

order prayed for is to be served on the said Commissioner of Immigration.

BRADFORD M. MELVIN,
Attorney for Petitioner. [6]

State of California,
City and County of San Francisco,—ss.

Lam Young, being first duly sworn, deposes and says: That he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief and as to those matters he believes it to be true.

LAM YOUNG.

Subscribed and sworn to before me this 5th day of February, 1926.

[Seal] B. B. FUAZZI,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 5, 1926. [7]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

GOOD CAUSE APPEARING THEREFOR, and upon reading the verified petition on file herein, it is hereby ordered that John D. Nagle, Commissioner of Immigration for the port and District of San Francisco appear before this Court on the 15th day of February, 1926, at the hour of 10 o'clock A. M., of said day, to show cause, if any he has,

why a writ of habeas corpus should not be issued herein as prayed for and that a copy of this order be served upon the said Commissioner and a copy of said petition upon United States Attorney, and

IT IS FURTHER ORDERED that the said John D. Nagle, Commissioner of Immigration aforesaid, or whomsoever acting under the order of the said Commissioner and Secretary of Labor shall have the custody of Phuong Con and is hereby ordered and directed to retain the said Phuong Con within the custody of said Commissioner of Immigration and within the jurisdiction of this court until further order herein.

Dated: February 5th, 1926.

FRANK H. KERRIGAN,
Judge of the United States District Court.

[Endorsed]: Filed Feb. 5, 1926. [8]

[Title of Court and Cause.]

DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

COMES NOW the respondent, John D. Nagle, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts suffi-

cient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the hearing of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

GEO. J. HATFIELD,
United States Attorney,
ROBERT M. FORD,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Feb. 23, 1926. [9]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 23d day of February, in the year of our Lord one thousand nine hundred and twenty-six. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—FEBRUARY 23, 1926—ORDER SUBMITTING CAUSE.

This matter came on regularly this day for hear-

ing on order to show cause as to the issuance of a writ of habeas corpus herein. Counsel was present for respective parties. Respondent filed demurrer to petition and also presented Immigration Records as Respondent's Exhibits "A" and "B," and all parties consenting thereto, IT IS ORDERED that said Immigration Records be considered as part of original petition. After argument by the respective attorneys, the Court ordered that said matter be and the same is hereby submitted. After consideration had thereon, further ordered demurrer sustained and writ denied. [10]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the Above-entitled Court, and the Hon. GEORGE J. HATFIELD, United States Attorney for the Northern District of California:

You and each of you will please take notice that Phuong Con, the detained herein, and Lam Young, the petitioner herein, do hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order made and entered herein on the 23d day of February, 1926, sustaining the demurrer, discharging the order to show cause, and denying the petition for a writ of habeas corpus filed herein.

Dated: San Francisco, Calif., March 4, 1926.

DION R. HOLM,

Attorney for Petitioner and Detained, Appellants Herein.

[Endorsed]: Receipt of a copy of the within is hereby admitted this 19 day of March, 1926.

GEO. J. HATFIELD,

U. S. Atty.

Filed Mar. 19, 1926. [11]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Phuong Con, the detained, and Lam Young, the petitioner, who are the appellants herein, and allege:

That on the 23d day of February, 1926, the above-entitled court made and entered its order denying the petition for writ of habeas corpus as prayed for and filed herein, sustaining a demurrer thereto and discharging an order to show cause, in which said order certain errors are made to the prejudice of the appellants, all of which will more fully appear from the assignment of errors filed herein.

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit for the correction of the errors so complained of, and further, that the transcript of the record, proceedings and papers in the above-en-

titled cause, as shown by the praecipe, may be sent and transmitted to the Circuit Court of Appeals for the Ninth Circuit, under the rules of said court, in accordance with the law in such case made and provided, and that all further proceedings in this matter be stayed until the final determination of said appeal.

Dated: San Francisco, Calif., March 4, 1926.

DION R. HOLM,
Attorney for Appellants. [12]

[Endorsed]: Receipt of a copy of the within is hereby admitted this 19 day of March, 1926.

GEO. J. HATFIELD,
S.,
U. S. Atty.

Filed Mar. 19, 1926. [13]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Phuong Con, the detained herein by Lam Young, the petitioner herein, both of whom are appellants, by their attorney, Dion R. Holm, and file the following Assignment of Errors, upon which they will rely in the prosecution of their appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made by this Honorable Court on the 23d day of February, 1926.

I.

That the Court erred in denying the petition for writ of habeas corpus.

II.

That the Court erred in sustaining the demurrer to the petition for a writ of habeas corpus and in not ordering and discharging Phuong Con from the custody of John D. Nagle, Commissioner of Immigration at the Port of San Francisco.

III

That the Court erred in not holding that the allegations set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus. [14]

IV.

That the Court erred in not holding that Phuong Con was or is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration at the Port of San Francisco.

V.

That the Court erred in not holding that there was an abuse of discretion on the part of the Commissioner of Immigration and the Secretary of Labor in denying the said Phuong Con the right to enter the United States.

VI.

That the Court erred in not holding that the hearing or hearings accorded the said Phuong Con

by the Commissioner of Immigration and the Secretary of Labor was or were unfair.

VII.

That the Court erred in finding that it was not an unfair proceeding on the part of the Commissioner of Immigration at Angel Island and/or the Secretary of Labor in disregarding the Section 6 certificate issued to said Phuong Con.

VIII.

That the Court erred in holding that the said Phuong Con was not excluded from the United States without due process of law.

IX.

That the Court erred in not holding that the Section 6 certificate presented by the said Phuong Con to the Commission of Immigration at Angel Island complies fully with all of the requirements of Section 6 of the Act of 1882 as amended by the Act of July 5, 1884, 23 Stat. L., 125; that said certificate was issued by the proper authority and was viseed [15] by the appropriate Consular representative of the United States, and as such legally entitled the said Phuong Con the right of entry into the United States.

WHEREFORE, because of the many manifest errors committed by the said Court the appellants pray that the said judgment sustaining the demurrer to the petition for the writ of habeas corpus, discharging the order to show cause, and denying the writ of habeas corpus be reversed and that the

said Phuong Con be restored to his liberty and permitted to enter the United States, and for such further relief as the Court may deem meet and proper.

Dated: San Francisco, California, March 4, 1926.

DION R. HOLM,
Attorney for Appellants.

Receipt of a copy of the within assignment of errors is hereby admitted this 19th day of March, 1926.

GEO. J. HATFIELD,
S.,
U. S. Atty.

[Endorsed]: Filed Mar. 19, 1926. [16]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On motion of Dion R. Holm, attorney for Lam Young, the petitioner in the above-entitled cause and for Phuong Con, the detained:

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment heretofore made and entered herein, sustaining the demurrer to the petition for a writ of habeas corpus, discharging the order to show cause and denying the petition for a writ of habeas corpus be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith trans-

mitted to the United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law, and that meanwhile all further proceedings in this Court and by the Commissioner of Immigration at Angel Island, California, and by the Secretary of Labor at Washington, D. C., be suspended, stayed and superseded until the determination of said appeal.

Dated: San Francisco, March 19, 1926.

FRANK H. KERRIGAN,
Judge of the United States District Court, in and for the Northern District of California. [17]

Receipt of the within is hereby admitted this 19 day of March, 1926.

GEO. J. HATFIELD,
S.,
U. S. Atty.

[Endorsed]: Filed Mar. 19, 1926. [18]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, and GEORGE J. HATFIELD, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city

of San Francisco, in the State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Phuong Con and Lam Young are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California, this 19 day of March, 1926.

FRANK H. KERRIGAN,
United States District Judge. [19]

[Endorsed]: Recd. a copy March 19, 1926.
GEO. J. HATFIELD,
T. J. S.,
U. S. Atty.

Filed Mar. 19, 1926. [20]

[Title of Court and Cause.]

SUBSTITUTION OF ATTORNEYS.

I, Bradford M. Melvin, hereby substitute as the attorney of record in the above-entitled proceedings, Dion R. Holm.

BRADFORD M. MELVIN.

I hereby accept the foregoing substitution of attorney.

DION R. HOLM.

Dated: San Francisco, Calif., March 4, 1926.

[Endorsed]: Receipt of a copy of the within is hereby admitted this 19 day of March, 1926.

GEO. J. HATFIELD,
S.,
U. S. Atty.

Filed Mar. 19, 1926. [21]

[Title of Court and Cause.]

STIPULATION AND ORDER DIRECTING TRANSMISSION OF ORIGINAL EXHIBITS TO APPELLATE COURT.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties in the above-entitled cause and their attorneys, that the original record of the Bureau of Immigration which was filed in the above-entitled court as respondent's exhibit, may be transferred in its original form and without being transcribed to the United

States Circuit Court of Appeals for the Ninth Circuit, and the same is and may there be considered part of the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of said respective parties or their attorneys.

Dated: San Francisco, Calif., March 19, 1926.

GEO. J. HATFIELD,
United States District Attorney.
T. J. SHERIDAN,
Assistant United States District Attorney.
DION R. HOLM,
Attorney for Appellants.

IT IS HEREBY ORDERED that the terms of the above stipulation be complied with.

FRANK H. KERRIGAN,
Judge of the U. S. District Court in and for the Northern District of California.

[Endorsed]: Filed Mar. 19, 1926. [22]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 22 pages, numbered from 1 to 22, inclusive, contain a full, true and correct transcript of the records and proceedings, in the Matter of Phuong Con, on Habeas Corpus, No. 18,908, as the same now remain on file and of record in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Four dollars and five cents ($4.05), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of March, 1926.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [23]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, and GEORGE J. HATFIELD, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within 30 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Phuong Con and Lam Young are appellants and you are ap-

pellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Southern Division of the Northern District of California, this 19 day of March, 1926.

FRANK H. KERRIGAN,
United States District Judge. [24]

Recd. a copy March 19, 1926.

GEO. J. HATFIELD,
T. J. S.,
U. S. Atty.

[Endorsed]: Filed Mar. 19, 1926. [25]

[Endorsed]: No. 4814. United States Circuit Court of Appeals for the Ninth Circuit. Lam Young, for and on Behalf of Phuong Con, Appellant, vs. John D. Nagle, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed March 22, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

23 [Minute entry of argument and submission, May 14, 1926, omitted in printing.]

24 In United States Circuit Court of Appeals, Ninth Circuit

LOI HOA, APPELLANT vs. JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION AT THE port of San Francisco, California, appellee.	No. 4813
LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON, appellant vs. JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION AT THE port of San Francisco, California, appellee.	No. 4814

Order directing filing of opinion and filing and recording of decrees

Filed June 1, 1926

By direction of the Honorable William B. Gilbert, William H. Hunt, and Frank H. Rudkin, circuit judges, before whom the above-entitled causes were heard, ordered that the typewritten opinion this day rendered by this court in the above-entitled causes be forthwith filed by the clerk and that a decree be filed and entered in the minutes of this court in each of said causes in accordance with the opinion filed therein.

25 In United States Circuit Court of Appeals

No. 4813, No. 4814

Opinion

Filed June 1, 1926

Before Gilbert, Hunt, and Rudkin, circuit judges.

GILBERT, Circuit Judge:

26 These two appeals present the question of the right of Chinese merchants, citizens, and subjects of the Republic of China to enter the United States as such merchants under authority of certificates issued in regular form in compliance with section 6 of the act of May 6, 1882 (22 Stats. 58), as amended by the act of July 5, 1884 (23 Stats. 115); but made by a French official of French Indo-China, at Saigon and not by an official or representative of the Republic of China, the applicants having been domiciled merchants

for a number of years in Indo-China. Their right to enter the United States was denied by a board of special inquiry, and on appeal to the Department of Labor the ruling was affirmed on the ground that the applicants were only residents and not naturalized citizens of Indo-China, and that the country to which they owed full and unqualified allegiance at the time of their coming to the United States is the country from which they must obtain their certificates. Section 6 of the act requires that a Chinese merchant on coming to the United States "shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such government."

The solution of the question here involved depends upon the construction to be given to the word "subject" as used in the statute. The word may have a variant meaning in treaties or statutory enactments, according to the context and to the purpose intended to
27 be subserved. Thus in Respublica v. Chapman, 1 Dallas 53, 60, it was held that it implies a subjection to some sovereign power and means "one who owes obedience to the laws, and is entitled to partake of the elections into public office." But in The Pizarro, 2 Wheat. 227, 245, it was held that in a certain section of our treaty with Spain the words "subjects," "people," and "inhabitants" were "indiscriminately used as synonymous." The court said: "Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country while he resides in it; temporary, indeed, if he has not by birth or naturalization contracted a permanent allegiance; but so fixed that as to all other nations he follows the character of that country in war as well as in peace." In Carlisle v. United States, 16 Wall. 147, 154, it was said: "The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until by some open and distinct act he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence."

Appellants contend that the word "subject" as used in the exclusion act means one who is resident in or domiciled in "such other foreign" country, and they find support of that construction in the words "of which at the time." We think the contention must
28 be sustained. The treaties with China and the statutes enacted in pursuance thereof were obviously intended only for the benefit of American citizens and Chinese subjects. To become subjects of Indo-China so as to owe allegiance to the government thereof these appellants would have been required to renounce their allegiance to the country in which they were born and all rights which they

theretofore had as subjects of China. We think it inconceivable that either by the United States or by China the benefits of the treaty here involved were intended to be extended to subjects of other nations.

This reasoning is rejected by the Department of Labor for the reason, it is said, "that Chinese may, if they so desire, become citizens or subjects of other nations by naturalization," and thus obtain certificates under section 6. But it is not to be supposed that in entering into the treaties with the United States the Chinese Government had in mind the protection of Chinese who had transferred their allegiance to other countries and had ceased to be Chinese subjects. This is denied by the very terms of the treaties. In the treaty of November 17, 1880, it was declared that the purpose thereof was to promote commercial relations "between the citizens and subjects of the two powers." And in the treaty of March 17, 1894, it was recited that the purpose was "to protect the citizens or subjects, or each, within the jurisdiction of the other." And it is significant as expressing the understanding of the high contracting parties that in that treaty, which was in force for a period of ten years, it was expressly
29 provided that in order that Chinese merchants and others of the favored class might be admitted to the United States they might produce a certificate from their Government, "or the government where they last resided."

The judgment in each case is reversed and the cause is remanded with instructions to issue the writ of habeas corpus as prayed for.

[File indorsement omitted.]

30 In United States Circuit Court of Appeals

No. 4814

Decree

Filed June 1, 1926

Apeal from the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

This cause came on to be heard on the transcript of the record from the Southern Division of the District Court of the United States for the Northern District of California, Second Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the judgment of the said district court in this cause be, and hereby is, reversed, and that this cause be, and hereby is, remanded to the said district court with instructions to issue the writ of habeas corpus as prayed for.

[File indorsement omitted.]

31 In United States Circuit Court of Appeals

No. 4813, No. 4814

Order staying mandates

Filed July 29, 1926

Good cause therefor appearing, it is hereby ordered that the issuance of each of the mandates in the above-entitled causes be stayed to and including September 1, 1926.

Dated, San Francisco, July 27, 1926.

WM. H. HUNT,
United States Circuit Judge.

[File indorsement omitted.]

[Clerk's certificate omitted in printing.]

33 Supreme Court of the United States

Order allowing certiorari

Filed November 23, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

○

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IS A MERCHANT OF THE CHINESE RACE ENTITLED TO ADMISSION TO THE UNITED STATES UNDER SECTION 6 OF THE CHINESE EXCLUSION ACT OF MAY 6, 1882, AS AMENDED BY THE ACT OF JULY 5, 1884, UPON A CERTIFICATE IN THE FORM REQUIRED BY THAT SECTION, ISSUED BY A COUNTRY OF WHICH HE IS A RESIDENT BUT TO WHICH HE DOES NOT OWE PERMANENT AND GENERAL ALLEGIANCE? MORE SPECIFICALLY, THE QUESTION IS AS TO THE MEANING OF THE WORD "SUBJECT" AS USED IN SECTION 6	1
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In the Supreme Court of the United States

OCTOBER TERM, 1926

Nos. ——

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the port of San Francisco, petitioner

v.

LOI HOA

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the port of San Francisco, petitioner

v.

LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of John D. Nagle, Commissioner of Immigration at the Port of San Francisco, prays that a writ of certiorari issue to review the judgments of the Circuit Court of Appeals for the Ninth Circuit entered on June 1, 1926.

QUESTION PRESENTED

I

Is a merchant of the Chinese race entitled to admission to the United States under Section 6 of the Chinese Exclusion Act of May 6, 1882, as

amended by the Act of July 5, 1884, upon a certificate in the form required by that section, issued by a country of which he is a resident but to which he does not owe permanent and general allegiance? More specifically, the question is as to the meaning of the word "subject" as used in Section 6.

THE STATUTE

The Chinese Exclusion Act of May 6, 1882 (c. 126, 22 Stat. 58), as amended by the Act of July 5, 1884 (c. 220, 23 Stat. 115), provides:

> SEC. 6. That in order to the faithful execution of the provisions of this Act, every Chinese person, other than a laborer, who may be entitled by said Treaty or this Act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a *subject*. * * * (Italics ours.)

STATEMENT

The respondent, Loi Hoa, a Chinese person, upon applying at San Francisco, California, on October 31, 1925, for admission as a merchant, testified that he was born in Chew On Village, Suning District of China, August 23, 1899, and that since 1919 he has lived at Cholon, a city in French Indo-China, where his occupation has been that of a merchant of a named company. While concededly a citizen

and subject of China, the only certificate which he presented from a foreign government granting him permission, and identifying him as entitled, to come to the United States was one issued by the Chief of the Immigration Service of the Government of French Indo-China. (R. 5; Original Immigration Record, mentioned R. 10.)

The respondent, Phuong Con, a Chinese person, upon applying at San Francisco, California, on November 18, 1925, for admission as a merchant, testified that he was born in the Sar Gai Hong Village, H. P. D., China, October 21, 1894; that he is a citizen or subject of China; that he had never renounced his allegiance to China in any manner and that he had never become a citizen or subject of any country other than China. He further testified that he was a merchant in his home village from 1913 until 1915, when he went to Tai Yuen City, Indo-China, where he was a merchant until 1924, when he returned to his home in Sar Gai Hong Village in China and followed no occupation but was awaiting a decision of the American authorities with reference to permission to come to the United States as a Section 6 merchant. The only certificate which he presented from a foreign government granting him permission, and identifying him as entitled to come to the United States was one issued by "Le Chef du Service de l'Immigration et du Controle de la Maind'oeuvre agricole," of the Government of French Indo-China. (R. 3; Original Immigration Record, mentioned R. 10.)

The official in each case who issued the certificate had been designated by the French Government to issue such certificates to Chinese persons being citizens or subjects of French Indo-China, but had not been designated by the Chinese Government to issue certificates of this nature to its citizens or subjects. It is not claimed by the Government that there is in French Indo-China any Chinese official or other official, authorized by the Chinese Government, to issue such certificates. Each certificate bore the usual certificate of investigation and visa of the American Consul at Saigon, French Indo-China. Each Chinese was excluded on the sole ground that he had not submitted a Section 6 certificate issued by the government to which he owes allegiance and of which he is a citizen or subject. (Original Immigration Record, mentioned R. 10.)

In habeas corpus proceedings in each case the District Court sustained the demurrer to the petition. (R. 10.) On appeal, the cases were consolidated by the Circuit Court of Appeals for the Ninth Circuit, and the judgment of the District Court reversed and remanded with instructions to issue the writs of habeas corpus as prayed for, on the ground that the Chinese being residents of French Indo-China were subjects thereof within the meaning of the Chinese Exclusion Law. (R. 21, *Loi Hoa case.*)

SPECIFICATION OF ERROR TO BE URGED

The error which the petitioner urges as ground for the granting of the writ of certiorari and for

the reversal of the decision of the Circuit Court of Appeals for the Ninth Circuit is:

1. The court erred in holding that merchants of the Chinese race, citizens and subjects of the Republic of China, are entitled to enter the United States under authority of certificates issued in regular form in compliance with Section 6 of the Chinese Exclusion Act of May 6, 1882, as amended by the Chinese Exclusion Act of July 5, 1884, by an official of French Indo-China, where the Chinese merchants had been domiciled for a number of years, and not issued by a duly authorized official or representative of the Republic of China.

REASONS FOR GRANTING THE PETITION

1. The Circuit Court of Appeals has misconstrued the meaning of the laguage "by the Chinese Government or of such other foreign government of which at the time such Chinese person shall be a subject" in Section 6 of the Chinese Exclusion Act of May 6, 1882 (22 Stat. 58), as amended by the Act of July 5, 1884 (23 Stat. 115).

2. The court's construction overrules the settled practice of the Department of Labor and the Department of State as to what government Section 6 Certificates are to be obtained from by Chinese of the classes exempt from exclusion.

3. The case is one of importance in the administration of the Chinese Exclusion Acts and the Immigration Act of 1924 (43 Stat. 153) for the reason that the admissibility of most Chinese aliens under

the last named Act depends upon whether they are entitled both by treaty and the Chinese Exclusion Laws to come to the United States. In the case of a Chinese alien claiming a right to enter the United States on these grounds, it is important that his status be certified to by the country which is a party to the treaty and of which he is a subject or citizen.

4. Under the decision of the Circuit Court of Appeals it will be possible for a Chinese person who is a subject of China to obtain admission under the treaty between the United States and China and the Immigration Act of 1924, although his Section 6 certificate be not issued by the Government of China, but only by some other country of which he is a resident. That possibility would be an inducement for Chinese aliens to claim to be citizens of the country which is a party to the treaty providing for the admission of certain classes, and to present Section 6 certificates from another country in which they reside. Such other country not being under any treaty obligation, its officials will not have the concern to investigate and verify with care the nationality of such persons or their status, and if it is later discovered by this country that the alien was not of the status claimed or not a subject of the country which was a party to the treaty, there will be no basis under a treaty for a complaint to either the country which issued the certificate or to that of which he claimed to be a subject. The way would be open to defeat the laws by the use of cer-

tificates whose purpose the statute declares to be to aid in the faithful execution of the laws.

5. The question involved in this case is one of Federal law which has not been, but should be, settled by this Court.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

AUGUST, 1926.

7697—26——2

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The opinions of the courts below have not been reported. However, the orders of the District Court sustaining demurrers to petitions for writs of habeas corpus and denying writs, without opinion, will be found on page 10 of the Transcripts of Record and the opinion of the Circuit Court of Appeals for the Ninth Circuit on page 21 of the Record in the *Loi Hoa case.*

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on June 1, 1926.

No question of jurisdiction was raised in the courts below.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, ch. 229).

STATEMENT OF FACTS

The facts have been stated above in the petition (pp. 2–4) to which reference is made.

TREATY AND STATUTES INVOLVED

Article II of the Treaty between the United States and China of November 17, 1880 (22 Stat. 826), provides:

> Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

The Chinese Exclusion Act of May 6, 1882 (c. 126, 22 Stat. 58), as amended by the Act of July 5, 1884 (c. 220, 23 Stat. 115), and continued in force indefinitely by the Acts of April 29, 1902 (c. 641, 32 Stat. 176), and of April 27, 1904 (c. 1630, 33 Stat. 394, 428), Section 1 and Section 14, and part of Section 6 and Section 15, as amended, the matter inserted in amended Sections 6 and 15 being italicized, and the matter stricken out being in parentheses, read as follows:

> Sec. 1. That from and after the passage of this Act, * * * the coming of Chinese laborers be, and the same is hereby, suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come, to remain within the United States.
>
> Sec. 6. That in order to the faithful execution of (articles one and two of the Treaty in) *the provisions of* this Act (before mentioned), every Chinese person, other than a laborer, who may be entitled by said Treaty (and) *or* this Act to come within the United

States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese government, *or of such other foreign government of which at the time such Chinese person shall be a subject,* in each case (such identity) to be evidenced by a certificate issued (under the authority of said) *by such* government, which certificate shall be in the English language (or if not in the English language accompanied by a translation into English, stating such right to come) *and shall show such permission, with the name of the permitted person in his or her proper signature,* and which certificate shall state the *individual, family, and tribal* name *in full,* title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued,* and place of residence (in China) of the person to whom the certificate is issued, and that such person is entitled (conformably to the Treaty in) *by* this Act (mentioned) to come within the United States. * * * *The certificate provided for in this Act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be visaed by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart;*

and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same.

Such certificate visaed as aforesaid shall be prima facie evidence of the fact set forth therein, and shall be produced to the collector of customs (or his deputy) of the port in the district in the United States at which the person named therein shall arrive, *and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*

Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed.

Sec. 15. That *the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and* the words "Chinese laborers," wherever used in this act, shall be

construed to mean both skilled and unskilled laborers and Chinese employed in mining.

Section 3 of the Immigration Act of 1924 (Chap. 190, 43 Stat. 153) provides:

> When used in this Act the term "immigrant" means any alien departing from any place outside of the United States destined for the United States, except * * * (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

Section 13 of the Immigration Act of 1924 provides:

> (c) No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * is not an immigrant as defined in Section 3.

Section 25 of the Immigration Act of 1924 provides:

> The provisions of this Act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws * * *. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien although admissible under the provisions of the immigration laws other than this Act, shall not be

admitted to the United States if he is excluded by any provision of this Act.

Section 28 of the Immigration Act of 1924 provides:

> (c) The term "ineligible to citizenship," when used with reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under * * * section 14 of the Act entitled "An Act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882.
>
> (g) The term "immigration laws" includes * * * this Act, and all laws, conventions, and treaties, of the United States relating to the immigration, exclusion, or expulsion of aliens; * * *.

ARGUMENT

I

THE WORDING OF SECTIONS 6 AND 15 OF THE ACT OF JULY 5, 1884, AND THE PURPOSE OF CONGRESS SUPPORT THE CONSTRUCTION THAT "SUBJECT" AS USED IN SECTION 6 MEANS A CHINESE OWING PERMANENT ALLEGIANCE TO A FOREIGN GOVERNMENT

This case turns upon the meaning of the word "subject" as used in Section 6 of the Act of July 5, 1884, namely, "* * * every Chinese person, other than a laborer, who may be entitled by said Treaty or this act to come within the United States * * * shall obtain the permission of and be identified as so entitled by the Chinese government,

or of such other foreign government of which at the time such Chinese person shall be a *subject*, in each case to be evidenced by a certificate issued by such government * * *." (Italics ours.) It is the contention of the Government that the word "subject" as used in Section 6 means a person of Chinese descent who owes permanent allegiance to "such other foreign government" by virtue of birth or naturalization therein; and, therefore, a person of Chinese descent who owes permanent allegiance to the Chinese government but who merely resides within the jurisdiction of and owes temporary allegiance to "such other foreign government" is not a "subject" of the latter within the meaning of the statute.

Webster's New International Dictionary defines the word "subject" as follows:

> Specifically, one who is subject to a monarch or ruler and is governed by his law; in a wider sense, one who lives in the territory of, and enjoys the protection of, and owes allegiance to, a sovereign power or state. Primarily and accurately speaking "subject" is used only to denote one who by birth, or now by naturalization, owes allegiance to a monarch or conquering state; but the term is loosely used, esp. in international law, to designate also a citizen of any other form of sovereign state, as of the United States, and even, in a still wider sense, a citizen of a commonwealth constituting a member of a sovereign state.

Dicey in "Conflict of Laws" (2d Ed.), pp. 164, says:

> The term "British subject" means any person who owes permanent allegiance to the Crown. "Permanent" allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within British dominions, owes "temporary" allegiance to the Crown.

Section 15 of the Act of July 5, 1884, provides:

> That the provisions of this act shall apply to all *subjects of China* and *Chinese*, whether *subjects of China* or *any other foreign government*. * * * (Italics ours.)

Here Congress clearly distinguishes between "subjects of China" and "Chinese * * * subjects of any other foreign government." In other words, the Chinese Exclusion Laws may not be defeated because one of that race is a citizen of and owes permanent allegiance to a foreign government other than China. It was also intended that subjects of China of the exempt classes should not enjoy greater privileges than exempt persons of Chinese descent who were citizens of other foreign governments. It is, therefore, a fair inference to assume that in Section 6 Congress intended the same distinction, namely, between subjects of China and subjects or citizens of Chinese descent of other foreign governments.

The obvious purpose of the Chinese Exclusion Acts was to exclude from the United States all

Chinese except certain exempt classes. In effecting this purpose, Congress no doubt considered that the government to which the privileged Chinese owed permanent allegiance would exercise greater care in issuing the requisite documents indicating his exempt status than the government of the country in which he merely resided and which might not be familiar with the data required.

II

GREAT WEIGHT SHOULD BE GIVEN THE CONSTRUCTION BY THE EXECUTIVE DEPARTMENTS CHARGED WITH THE EXECUTION OF THE CHINESE EXCLUSION LAWS, REQUIRING THAT THE CHINESE GOVERNMENT OR ITS DULY AUTHORIZED REPRESENTATIVE MUST ISSUE SECTION 6 CERTIFICATES TO CHINESE CITIZENS RESIDENT IN FOREIGN COUNTRIES.

The practical construction given to an Act of Congress, fairly susceptible of different constructions, by executive departments charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons. *McLaren* v. *Fleischer*, 256 U. S. 477, and cases cited at p. 481.

President Cleveland, in a special message to Congress on April 6, 1886 (8 Richardson's Messages, 390), calls attention to what he designates as an anomalous feature of Section 6 of the Act of July 5, 1884, in not providing for the issuance of certificates "to Chinese persons who, retaining their Chinese subjection in some countries other than China

desire to come from such countries to the United States." He continues:

> Chinese merchants have trading operations of magnitude throughout the world. They do not become citizens or subjects of the country where they may temporarily reside and trade; they continue to be subjects of China, and to them the explicit exemption of the treaty applies. Yet if such a Chinese subject, the head of a mercantile house at Hongkong or Yokohama or Honolulu or Havana or Colon, desires to come from any of these places to the United States, he is met with the requirement that he must produce a certificate, in prescribed form and in the English tongue, issued by the Chinese Government. If there be at the foreign place of his residence no representative of the Chinese Government competent to issue a certificate in the prescribed form, he can obtain none, and is, under the provisions of the present law, unjustly debarred from entry into the United States. His usual Chinese passport will not suffice, for it is not in the form which the act prescribes shall be the sole permissible evidence of his right to land. And he can obtain no such certificate from the Government of his place of residence, because he is not a *subject or citizen thereof "at the time," or at any time.* (Italics ours.)

This feature of Section 6 apparently has been remedied to a certain extent by the designation by the Chinese Government of representatives in certain foreign countries who are authorized to issue

cate only from the government of which he owes his allegiance.

As heretofore pointed out, the number of persons authorized to issue such certificates to Chinese resident in foreign countries who do not owe permanent allegiance to such countries, have been increased subsequently by the designation by the Chinese Government of consular and other officers to act in that capacity.

The Secretary of Labor for a long period of years has adopted also the construction that a Chinese person, owing permanent allegiance to the Government of China but who is resident in a foreign country, must obtain a Section 6 certificate from a duly authorized representative of the Chinese Government as distinguished from the government of the foreign country in which he resides.

Rule 10, Rules governing the Admission of Chinese, promulgated by the Secretary of Labor, May 1, 1917, provides:

> The officers whose titles are given below have been authorized by their respective Governments to issue to Chinese subjects or citizens of such Governments the certificates prescribed by Section 6 of the Act approved July 5, 1884.

Then follows a list of countries alphabetically arranged with the title of the official or officials in each designated for the purpose. For example:

Canada:
Ottawa—Chief or Assistant Controller of Chinese Immigration.
China:
In Chinese Republic—
Canton, Civil Governor.
In countries foreign to China—
Canada, Chinese Consul General, Ottawa.

Manifestly, it was contemplated by such rule that the Chinese Consul General is to issue the Section 6 certificates to Chinese subjects in Canada of the exempt classes coming to the United States and that the Chief or Assistant Controller of Chinese Immigration is to issue such certificates to British subjects of Chinese descent of the exempt classes coming to the United States.

III

THE PROPER ADMINISTRATION OF THE IMMIGRATION ACT OF 1924 REQUIRES SECTION 6 CERTIFICATE TO BE ISSUED BY GOVERNMENT TO WHICH CHINESE OWES PERMANENT ALLEGIANCE

Chinese aliens of the exempt classes, to one of which the respondents herein belong, are ineligible to citizenship in the United States. Section 14, Act of May 6, 1882 (c. 126, 22 Stat. 58), as amended by Act of July 5, 1884 (c. 220, 23 Stat. 115). Section 13 (c) of the Immigration Act of May 26, 1924 (c. 190, 43 Stat. 153), provides that no alien ineligible to citizenship shall be admitted to the United

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 115

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the Port of San Francisco, petitioner

v.

LOI HOA

No. 116

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the Port of San Francisco, petitioner

v.

LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The United States District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 21, Loi Hoa; R. 23, Phuong Con) is reported in 13 F. (2d) 80.

JURISDICTION

The judgments of the Circuit Court of Appeals to be reviewed were entered June 1, 1926. (R. 23, Loi Hoa; R. 25, Phuong Con.) The petition for certiorari was filed August 31, 1926, and granted November 23, 1926, pursuant to the Act of February 13, 1925.

QUESTION PRESENTED

Section 6 of the Chinese Exclusion Act of May 6, 1882, as amended by the Act of July 5, 1884, provides that every Chinese person entitled by treaty or statute to come within the United States shall obtain the permission of and be identified as so entitled

> by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government.

The question in this case is whether a native-born Chinese merchant who has resided and conducted a business in French Indo-China, but who owes permanent allegiance to the Government of China and has never been naturalized under French law, is a subject of France or of China within the meaning of this statute, and whether the certificate provided for in Section 6 should be issued by the Chinese Government or some official designated by it, or by the French colonial government of Indo-China.

TREATIES AND STATUTES INVOLVED

Article II of the treaty between the United States and China of November 17, 1880 (22 Stat. 826, 827) is as follows:

> Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

Sections 6 and 15 of the Chinese Exclusion Act of May 6, 1882 (c. 126, 22 Stat. 58, 60, 61), were as follows:

> SEC. 6. That in order to the faithful execution of articles one and two of the treaty in this act before mentioned, every Chinese person other than a laborer who may be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese Government in each case, such identity to be evidenced by a certificate issued under the authority of said Government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English, stating such

right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued and that such person is entitled conformably to the treaty in this act mentioned to come within the United States.

SEC. 15. That the words "Chinese laborers," wherever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

The Act of July 5, 1884 (c. 220, 23 Stat. 115, 116, 118; U. S. C., Title 8, Secs. 265, 273), amended Sections 6 and 15 of the Act of 1882 to read as follows:

SEC. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title

or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be visaed by the indorsement of the diplomatic representatives of the United States in the foreign country from which such certificate issues, or of the consular

representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate visaed as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

SEC. 15. That the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and the words Chinese laborers, wherever used in this act shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

STATEMENT

These two cases were consolidated and dealt with together in the Circuit Court of Appeals. The original records of the Bureau of Immigration were introduced in evidence in the United States District Court, and were transmitted by stipulation to the Circuit Court of Appeals (R. 16, Loi Hoa; R. 18, Phuong Con), and have been sent to and are on file with the Clerk of this Court, but have not been printed. Some of the facts stated are taken from the original immigration records.

Respondent Loi Hoa is a person of the Chinese race, born in China. He arrived at San Francisco October 31, 1925, coming from French Indo-China, and applied for admission as a merchant. Since 1919 he has resided at and conducted business as a merchant in Saigon, Cholon, a city in French Indo-China. During this period his wife and children have been living in his house in Chewon Village, in China, where he was born. He testified as follows:

> Q. Of what country are you a citizen or subject?—A. China.
>
> Q. Have you ever become naturalized or a subject of France?—A. No.

To evidence his qualifications for admission as a merchant he presented a certificate issued November 26, 1924, by the Chief of the Immigration Service of Cochin-China, an official of the French colonial government authorized by the Governor Gen-

eral of Indo-China to sign Chinese certificates in Cochin-China. The certificate was not issued by the Chinese Government, nor signed by any official or person authorized so to do by the Chinese Government.

Respondent Phuong Con is a person of the Chinese race, born in Sar Gar Hong, China. He went to French Indo-China in June, 1916, and remained there, conducting business, until November, 1924. His Section 6 certificate is dated November 26, 1924, and was issued at Saigon, Indo-China, by the Chief of the Immigration Service of Cochin-China and not by any consular or diplomatic officer of the Chinese Government or by any person authorized by the Chinese Government to issue such certificates. Having obtained his certificate, he returned to his native village in China in November, 1924, where he remained until he sailed for San Francisco, where he arrived November 18, 1925. During the time he was in French Indo-China his wife and children remained in his native village of Sar Gar Hong, China. He testified:

> Q. Of what country are you a citizen or subject?—A. China.
>
> Q. Have you ever renounced your allegiance to China in any manner?—A. No.
>
> Q. Have you ever become a citizen or subject of any other country except China?—A. No.
>
> Q. Have you ever served in the French Colonial Army or taken any steps by which

you would become a subject or citizen of France?—A. No.

Q. You are positive, are you, that you are a citizen of China?—A. Yes. I am a Chinese citizen and went to do business in Hainom.

Each certificate bore the visa of the American consul at Saigon, French Indo-China. Each of the respondents was excluded, on the ground that he had not submitted a Section 6 certificate issued by the government of which he is a citizen or subject. Respondents then instituted habeas corpus proceedings and the United States District Court held that their certificates were insufficient, and sustained demurrers to the petitions for the writs and denied the writs.

On appeal the judgments of the District Court were reversed, the Circuit Court of Appeals holding that, although these respondents are native-born citizens of China and have never been naturalized under French law, they were subjects of France within the meaning of Section 6 of the Chinese Exclusion Act, because they had been domiciled there for a number of years.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that native-born Chinese who owe permanent allegiance to the Government of China and who have never been naturalized under French law are subjects of France within the meaning of Section 6 as amended by the Act of July 5, 1884, because for

some years they had been domiciled in French Indo-China, and in holding that the respondents may be admitted to the United States as merchants on certificates issued by French colonial officials of Indo-China, and in reversing the judgments of the District Court. (Petition for certiorari, p. 4.)

SUMMARY OF ARGUMENT

I. According to its primary and accurate meaning, the word "subject" denotes one who by birth or naturalization owes permanent allegiance to a government, and it was so used in Section 6 of the Chinese Exclusion Act of 1882 as amended in 1884. The word is used in that sense throughout our legislation. Its use to describe the relation to a government of an alien domiciled within its borders, and who is said to owe obedience and a temporary allegiance to such government while remaining within its territory, is limited and unusual. The purpose of Section 6, and its effect if construed to use the word "subject" in any but its primary and accurate sense, support the construction here contended for.

II. If there be a choice between two meanings of the word "subject," the practical construction of the statute will be decisive. For the forty-three years since its enactment Section 6 has been construed by the President, and by the four executive departments, State, Treasury, Justice, and Labor, which have dealt with it, and by the Chinese Government, to use the word "subject" to denote one who by birth or naturalization owes permanent al-

legiance to a country, and to require native-born Chinese, domiciled in countries foreign to China, to procure certificates from the Chinese Government and its authorized officials.

The decision of the Circuit Court of Appeals rejects the ordinary and usual meaning of the word "subject" and overturns the uniform executive construction of the statute during the forty-three years since its passage.

ARGUMENT

I

THE WORD "SUBJECT," AS USED IN SECTION 6 OF THE CHINESE EXCLUSION ACT, WAS USED IN ITS PRIMARY AND ORDINARY SENSE TO DENOTE ONE WHO BY BIRTH OR NATURALIZATION OWES PERMANENT ALLEGIANCE TO A GOVERNMENT

The first statute to carry out the provisions of the Chinese treaty of 1880 and otherwise restrict Chinese immigration, enacted May 6, 1882, provided only for certificates to be issued by the Chinese Government, certifying, among other things, to the place of residence in China of the person to whom the certificate was issued. Some courts soon thereafter held that the Act of 1882 did not forbid the admission of persons of the Chinese race who were subjects of governments other than China, and that Section 6 only required certificates from Chinese persons who had a place of residence in China. (*United States* v. *Douglas*, 17 Fed. 634; *In re Ah Lung*, 18 Fed. 28; *Case of the Chinese Merchant*, 13 Fed. 605.)

To make it plain that the Act was intended to exclude Chinese as a race regardless of their nationality, and to make it clear that certificates were required from subjects of China residing in other countries, the Act of 1884 was passed, which provided in Section 15 that its provisions should apply "to all subjects of China and Chinese, whether subjects of China or any other foreign power," and it amended Section 6 by inserting in reference to certificates the words "or of such other foreign Government of which at the time such Chinese person shall be a subject."

Extracts from the Congressional Record explaining the purpose of this amendment are set forth in the appendix (p. 47).

The question here presented is as to the sense in which the word "subject" was used in Section 6 as amended.

By common usage the word "subject" means a person who by birth or naturalization owes permanent allegiance to the government involved.

Dicey, Conflict of Laws, 2d ed., page 164, says that the term "'British subject' means any person who owes permanent allegiance to the Crown," the words "permanent allegiance" being used to "distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes 'temporary' allegiance to the Crown."

Webster's New International Dictionary defines "subject" as follows:

> Specif., one who is subject to a monarch or ruler and is governed by his law; in a wider sense, one who lives in the territory of, and enjoys the protection of, and owes allegiance to, a sovereign power or state. Primarily and accurately speaking *subject* is used only to denote one who by birth, or now by naturalization, owes allegiance to a monarch or conquering state; but the term is loosely used, esp. in international law, to designate also a citizen (which see) of any other form of sovereign state, as of the United States, and even, in a still wider sense, a citizen of a commonwealth constituting a member of a sovereign state. (See Citizen, 3; Allegiance, 2.)

In describing one who owes by birth or naturalization permanent allegiance to a government, the word "subject" is ordinarily used when a monarch or emperor is involved, and the word "citizen" when the government is republican.

In substantially all legislation in the United States the word "subject" is used to denote one who owes permanent allegiance to a government by birth or naturalization. Some illustrations of this are as follows:

In Section 2 of Article III of the Constitution, relating to the jurisdiction of the Federal courts, it is provided that their jurisdiction shall extend to cases

> between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The word "subject" is there used to denote one who by birth or naturalization owes permanent allegiance to a foreign government. (See *Hammerstein* v. *Lyne*, 200 Fed. 165, 170.)

The word "subject" is so used in our naturalization laws, which provide that the applicant shall renounce allegiance "to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject." (Act of June 29, 1906, c. 3592, Sec. 4, 34 Stat. 596; U. S. C., Title 8, Sec. 381.)

The immigration laws, providing for deportation of aliens, have used the words "subjects" or "citizens" to denote permanent allegiance by birth or naturalization as distinguished from temporary allegiance resulting from domicil, in those provisions which designate the country to which the deported alien shall be returned. (Sec. 20, Act of February 5, 1917, c. 29, 39 Stat. 874, 890; U. S. C., Title 8, Sec. 156.)

One who maintains a residence and conducts a business in a foreign country is a subject of that government during the period in which he remains there in the sense that he is required to obey its laws. Halleck, International Law, vol. 1, p. 414. That aspect of nationality ordinarily arises in time of war in determining the status of captured ships and goods. In *The Pizarro*, 2 Wheat. 227, relied on by the court below, there was involved a vessel sailing under Spanish colors captured during the War of 1812. One question was as to the Spanish character of the ship, her owner being a merchant domiciled in a Spanish possession but a native

born British subject, and the question was whether he was a subject of Spain within the meaning of the treaty between the United States and Spain relating to reciprocal rights in time of war. The court said (pp. 245–246):

> As to the second objection, it assumes, as its basis, that the term "subjects," as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear, that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and coextensive privileges to both countries; and to effectuate this object, the term "subjects," when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants," when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction is, that in the 18th article of the treaty, the terms "subjects," "people," and "inhabitants," are indiscriminately used as synonymous, to designate the same persons in both countries, and in cases obviously within the scope of the preceding articles. Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the

> country, while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace. The mischiefs of a different construction would be very great; for it might then be contended, that ships owned by Spanish subjects could be protected by the treaty, although they were domiciled in a foreign country, with which we were at war; and yet the law of nations would, in such a predicament, pronounce them enemies. We should, therefore, have no hesitation in overruling this objection, even if it were proved that Mr. Hibberson was not a naturalized subject of Spain; but we think the presumption very strong, that he had become, in the strictest sense of the words, a Spanish subject.

(See argument of the Attorney General at page 228.)

In this case the British merchant domiciled in Spain was held to be a subject of Spain within the meaning of this treaty because of the language of the treaty and its purpose.

In *Carlisle* v. *United States*, 16 Wall. 147, an appeal from the Court of Claims, it is stated that the claimants were subjects of the Queen of Great Britain, but had been residents within the United States prior to the war of the rebellion and during its continuance, and in 1864 were the owners of some bales of cotton in Alabama, seized by naval

officers of the United States. They brought their suit in the Court of Claims, which dismissed their case because they had given aid and comfort to the rebellion. This court held that when domiciled in the United States they owed a temporary allegiance to our government, saying (p. 154):

> By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

Having held that a proclamation of amnesty had cleared them of the offense of treason, the Court then held that the claimants were citizens and subjects of Great Britain and authorized to maintain the suit since the Government of Great Britain gave similar rights to citizens and subjects of the United States. (See Sec. 155, Judicial Code; U. S. C., Title 28, Sec. 261.) The words "citizen" or "subject" as used throughout the opinion in that case relate to those who owe permanent allegiance

through birth or naturalization, as distinguished from temporary allegiance arising from domicil.

No doubt the word "subject" is sometimes used in its broader sense to describe one who, through domicil within the limits of a nation, is subject to its laws and owes it temporary allegiance, but in its primary, accurate, and ordinary sense it relates to one who owes permanent allegiance through birth or naturalization. That such is the ordinary meaning of the word is convincingly disclosed by its use in legislation, executive rulings, and diplomatic correspondence set forth in this brief under the subject of practical construction.

That nothing in the purpose or operation of the statute here under consideration requires that the word "subject" be construed to describe the relation to a country of an alien domiciled within its limits is confirmed by the following considerations:

First. Residence and domicil are difficult matters to decide upon and involve intricate inquiries into the intentions and places of abode of the persons concerned. Immigration officers in dealing with Chinese claiming entry as merchants or students are required at the outset to decide whether their certificates are issued by the proper authorities. If citizenship by birth or naturalization is the test, it may ordinarily be readily applied, but if domicil or residence is the test, great difficulties immediately arise. In dealing with these cases the immigration officials have difficulty enough to

determine the facts without having a new subject of controversy introduced.

Second. Representatives of foreign nations in which native-born Chinese are domiciled for the time being, have not the same means of obtaining information respecting their antecedents and occupations necessary to determine intelligently their right to admission to the United States, as have the Chinese Government and its representatives.

Third. It will be noted that Section 6 requires that the government issuing the certificate shall give its permission to the Chinese to go and remain abroad in the United States. This suggests that the government to which the Chinese owe permanent allegiance by birth or naturalization is the one involved.

The national character which a man acquires by residence is adventitious and ceases by nonresidence. The French Government has no further interest in a native-born Chinese who comes to the United States merely because he may have previously been domiciled in France.

In dealing with Chinese presenting such certificates diplomatic complications result unless the dealings are with the government to which he owes permanent allegiance. In deportation cases it is often necessary to return the deported alien to the country of which he is a native-born or naturalized subject, as distinguished from the country from which he came.

Fourth. Anomalous situations arise if the word "subject" in Section 6 be construed to mean "resident." Section 13(c) of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 162; U. S. C., Title 8, Sec. 213(c)), provides that no alien ineligible to citizenship shall be admitted to the United States, unless he is not an immigrant as defined in Section 3 (U. S. C., Title 8, Sec. 203). Section 3 excludes from the definition of immigrant—

> an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

Chinese merchants are ineligible to citizenship and are inadmissible unless pursuant to such a treaty. We have in the treaty of 1880 such a treaty with China. We have no treaty with France that permits persons of the Chinese race, native-born subjects or citizens of China domiciled for the time being in French territory, to enter the United States. The result is that to obtain admission these respondents must claim they are subjects of China within the meaning of that word as used in the Chinese treaty of 1880, but are subjects of France within the meaning of Section 6 of the Act of 1884, intended to execute the terms of the treaty.

These considerations indicate that there are substantial reasons for the view that the word "subject" in Section 6 was used in its primary and accurate sense to denote the relation to a country of one who by birth or naturalization owes it per-

manent allegiance, and open the way for the consideration of the practical construction given the statute which should be conclusive of its meaning.

II

THE PRACTICAL CONSTRUCTION OF SECTION 6 SINCE ITS ENACTMENT IN 1884 HAS UNIFORMLY AND CONSISTENTLY GIVEN TO THE WORD "SUBJECT" THE MEANING CONTENDED FOR BY THE PETITIONER

Immediately after the passage of the Act of 1884, and on December 6 of that year, the Secretary of the Treasury issued a circular providing that—

> Chinese subjects, not laborers, desiring to come to the United States from countries other than China, may do so on production of a certificate corresponding to that required by section 6 of the Act of July 5, 1884, to be issued by a Chinese diplomatic or consular officer, or if there be no such Chinese officer stationed at such port, on a like certificate to be issued by a United States consular officer. (Foreign Relations, 1885, p. 184.)

In August, 1885, there arose the case of Chinese merchants who were native born subjects of China domiciled and residing in Hongkong, a British possession. Both the Secretary of State of the United States and the Chinese Government dealt with the case as if, being native born subjects of China, although domiciled in Hongkong, the merchants were required to present a certificate not from the British Government but from the Chinese Government or, in the absence of a Chinese official at Hong-

kong, from a United States consul. (Foreign Relations, 1885, pp. 184–186.)

On January 14, 1885, Treasury circular No. 7 was issued, providing as follows:

> (4) Chinese persons other than laborers coming to the United States for the first time from China can be permitted to enter the United States only upon the production of the certificate prescribed by section 6 of the act of July 5, 1884, such certificate being the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States.
>
> (5) Chinese subjects, not laborers, desiring to come to the United States from countries other than China may do so on production of a certificate corresponding to that required by section 6 of the act of July 5, 1884, to be issued by a Chinese diplomatic or consular officer, if there be one at the port of departure, countersigned by a United States consular officer; *or, if there be no such Chinese officer stationed at such port, on a like certificate to be issued by a United States consular officer.* (Italics ours.) (Foreign Relations, 1885, pp. 192, 193.)

On April 6, 1886, President Cleveland sent a special message to Congress (Richardson's Messages, Vol. VIII, p. 390), in which he took the position that Section 6, as amended by the Act of 1884, provided only for certificates for Chinese subjects departing from China, and persons of the Chinese race, being subjects of a foreign government other

than China, who might depart for the United States from a port of such foreign government, and suggested that provision be made for issuing certificates to Chinese persons who, remaining Chinese subjects, were domiciled in other countries where there were no Chinese officers stationed who could give a certificate from the Chinese Government. He said (pp. 392, 393):

> Chinese merchants have trading operations of magnitude throughout the world. They do not become citizens or subjects of the country where they may temporarily reside and trade; they continue to be subjects of China, and to them the explicit exemption of the treaty applies. Yet if such a Chinese subject, the head of a mercantile house at Hong Kong or Yokohama or Honolulu or Havana or Colon, desires to come from any of these places to the United States, he is met with the requirement that he must produce a certificate, in prescribed form and in the English tongue, issued by the Chinese Government. If there be at the foreign place of his residence no representative of the Chinese Government competent to issue a certificate in the prescribed form, he can obtain none, and is under the provisions of the present law unjustly debarred from entry into the United States. His usual Chinese passport will not suffice, for it is not in the form which the act prescribes shall be the sole permissible evidence of his right to land. And he can obtain no such certificate from the Government of his place of residence, be-

cause he is not a subject or citizen thereof "at the time," or at any time.

There being, therefore, no statutory provision prescribing the terms upon which Chinese persons resident in foreign countries but not subjects or citizens of such countries may prove their status and rights as members of the exempted classes in the absence of a Chinese representative in such country, the Secretary of the Treasury, in whom the execution of the act of July 5, 1884, was vested, undertook to remedy the omission by directing the revenue officers to recognize as lawful certificates those issued in favor of Chinese subjects by the Chinese consular and diplomatic officers at the foreign port of departure, when visced by the United States representative thereat. This appears to be a just application of the spirit of the law, although enlarging its letter, and in adopting this rule he was controlled by the authority of high judicial decision as to what evidence is necessary to establish the fact that an individual Chinaman belongs to the exempted class.

* * * * *

The complaint of the Chinese minister in his note of March 24, 1886, is that the Chinese merchant Lay Sang, of the house of King Lee & Co., of San Francisco, having arrived at San Francisco from Hong Kong and exhibited a certificate of the United States consul at Hong Kong as to his status as a merchant, and consequently exempt under the treaty, was refused permission to

land and was sent back to Hong Kong by the steamer which brought him. While the certificate he bore was doubtless insufficient under the present law, it is to be remembered that there is at Hong Kong no representative of the Government of China competent or authorized to issue the certificate required by the statute. The intent of Congress to legislate in execution of the treaty is thus defeated by a prohibition directly contrary to the treaty, and conditions are exacted which, in the words of the Supreme Court hereinbefore quoted, "it was physically impossible to perform."

This anomalous feature of the act should be reformed as speedily as possible, in order that the occurrence of such cases may be avoided and the imputation removed which would otherwise rest upon the good faith of the United States in the execution of their solemn treaty engagements.

GROVER CLEVELAND.

No legislation was enacted as suggested, as the difficulty was remedied by having the Chinese Government designate its diplomatic and consular or other agents in foreign countries to issue certificates for Chinese subjects domiciled in such foreign countries.

On May 29, 1891, the Chinese Minister called to the attention of the State Department the fact that two Chinese merchants holding Section 6 certificates, issued to them by the Chinese consul at Yokohama, Japan, had been refused admittance on the

ground that Chinese consuls in foreign countries had no right to issue certificates to Chinese merchants residing in their ports. The Chinese Minister, on June 2, 1891, addressed a letter to the State Department as follows:

Mr. Tsui to Mr. Wharton

CHINESE LEGATION,
Washington, June 2, 1891.

SIR: Confirming the statement made by me to you in our interview of yesterday, I have the honor to inform you that the Imperial Chinese Government, in order to facilitate a more perfect compliance with the terms of section 6 of the law of the Congress of the United States of July 5, 1884, has authorized the consuls of China in foreign countries to issue, in behalf of their Government, to the exempt class of Chinese residents in said countries the certificate of identity required by said law.

I shall therefore be greatly obliged if you will communicate the foregoing fact to the honorable Secretary of the Treasury, in order that he may issue such general instructions to the collectors of customs of ports of the United States as shall secure a recognition by them of the validity of certificates of Chinese consuls of the character named.

I am, etc.,

TSUI KWO YIN.

The merchants were thereupon admitted, and upon the matter being taken up by the Secretary of State with the Secretary of the Treasury the

latter wrote the State Department as follows (Foreign Relations, 1891, pp. 457–460):

Mr. Foster to Mr. Blaine

TREASURY DEPARTMENT,
Washington, June 12, 1891.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, transmitting a copy of a note from the Chinese minister at this capital, in which he states that the Imperial Government, in order to facilitate a more perfect compliance with the terms of section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884, has authorized the consuls of China in foreign countries to issue, in behalf of their Government, to the exempted or privileged class of Chinese residents in such countries the certificate of identity required by said section, and requests that this Department may give such general instructions to collectors of customs in the United States as shall secure a recognition by them of the validity of certificates of Chinese consuls of the character named.

The language of the section of law above referred to is as follows, viz:

(Here follows copy of section 6.)

In the opinion of this Department, the delegation of such authority by the Chinese Government to its consuls in foreign countries is not incompatible with the intent of the above section, and, inasmuch as this Department has already recognized such dele-

gation of authority in its telegram of the 1st instant, addressed to the collector of customs at San Francisco, in the case of two Chinese merchants and one student, subjects of China, arriving at that port per *City of Pekin*, holding certificates from the Chinese consul at Yokohama, properly visaed by the American consul, I will thank you to furnish the Chinese minister with a copy of this letter, and inform him that this Department perceives no objections to the acceptance by collectors of customs of certificates of the character mentioned, issued by Chinese consuls in other countries to Chinese subjects, and that action will be taken accordingly.

It may be mentioned that Department's circular of January 14, 1885, paragraph 5, as amended by its letter of July 13, 1885, contemplates the issuance of such certificates by Chinese diplomatic and consular officers to Chinese subjects, not laborers, desiring to come to the United States from countries other than China.

It is suggested that United States consular officers be advised of the fact of such delegation of authority.

Respectfully yours,

CHARLES FOSTER.

The following diplomatic correspondence in 1893 shows a mutual understanding of the governments of the United States and of China that native born Chinese citizens, domiciled abroad, were to be considered subjects of China within the meaning of

Section 6 of the Act of July 5, 1884 (Foreign Relations, 1893, pp. 260–262):

(Received October 11.)

Mr. Yang Yu to Mr. Gresham

CHINESE LEGATION,
Washington, October 10, 1893.

SIR: I have the honor to state that my predecessors, through interviews and correspondence, obtained the recognition by the collectors of customs, under regulations and instructions prescribed by the Secretary of the Treasury, of certificates of identity to the exempt class of Chinese persons, in order to facilitate a more perfect compliance with section 6 of the act of Congress approved July 5, 1884, and the Imperial Chinese Government, in accordance with an understanding so made and accepted by both governments, authorized the consuls of China in foreign countries to issue, in behalf of their own Government, to such exempt class of Chinese residents in said countries the certificates of identity required by said law, and such certificates have been issued by such consuls and recognized by the collectors of customs until a very recent date. In this connection I have the honor to say that I am in receipt of a note from the Chinese consul at New York City, and also of a petition signed by the Chinese board of trade and by twenty-four merchants of New York City, complaining that the customs officers decline to recognize and indorse such certificates, and

they claim that their action in this respect is controlled by orders from the Secretary of the Treasury.

The State Department disclaimed such action. On January 8, 1894, Attorney General Olney rendered an opinion (20 Op. A. G. 693) to the effect that consular officers of China in a foreign country other than China could issue Section 6 certificates. He said (p. 694):

> The requirement of this section is that the "permission" to and "identification" of the Chinese person shall be "evidenced by a certificate issued by such Government." The Government can act, in the issuance of such certificates, only through and by its officers and agents. If it chooses to select its consular officers in foreign countries as such officers and agents it has the right so to do, and it is not competent for this Government to question the propriety or fitness of the choice.
>
> I am of the opinion that such consular officers of China, being duly empowered by the Chinese Government, may properly issue the certificates in question.
>
> 2. Certificates issued by the duly authorized consular officers of China in foreign countries and accurately conforming in their contents to the requirements of section 6 are the certificates contemplated by the law.

Then came the treaty with China of December 8, 1894. (28 Stat. 1210.) Article III of this treaty contained the following provision (p. 1211):

> **The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may *produce a certificate from their Government or the Government where they last resided* visaed by the diplomatic or consular representative of the United States in the country or port whence they depart.** (Italics ours.)

While the Act of 1884 had provided that the certificates should be issued by the Chinese Government or of such other foreign country of which such Chinese person shall be a subject, the treaty of 1894 provided that the certificate for Chinese subjects entitled to admission into the United States should come "from their Government or the Government *where they last resided.*" This treaty, which ceased by its terms to operate in 1904, allowed certificates from the government of residence to be issued to Chinese subjects, and during the period of ten years in which the treaty operated such certificates were accepted.

In 21 Op. A. G. 347, rendered May 20, 1896, Acting Attorney General Holmes Conrad, dealing with the case of Chinese subjects resident in the British colony of Hong Kong, held not only that the treaty of 1894 permitted the use of a certificate from the

Colonial Government, but that the requirements of the treaty would not be satisfied by one from the Chinese Government. This opinion was sound in so far as it held that such a certificate was sufficient. It went beyond the necessities of the case and was open to question and was thereafter questioned in so far as it held that the treaty of 1894 required that the certificate come from the government of residence. The opinion does, however, contain matter bearing on the present question (p. 348):

> The act of July 5, 1884, chapter 220, section 6, requires that certificates in similar cases should be issued by the Chinese Government, "or of such other foreign Government of which at the time such Chinese person shall be *a subject*." Prior, therefore, to the treaty of 1894 a certificate from the authorities at Hong Kong would have been insufficient in the cases now under consideration, and a certificate from the Chinese Government would have been necessary.

This opinion was confirmed by Acting Attorney General Boyd on August 31, 1898 (22 Op. A. G. 201). He said (p. 204):

> My predecessor was of the opinion (21 Opin. 347) that the provisions of this article of the treaty of 1894 are self-executing and are a part of the supreme law of the land, and he holds in effect, therefore, that while prior to the treaty of 1884 a certificate from the foreign authorities as to privileged Chinese subjects resident within a foreign jurisdiction would have been insufficient, and a

certificate from the Chinese Government or its accredited consular officials would have been necessary, the treaty being subsequent to the act of 1884 has modified the requirements thereof, so that the certificate must now be issued in such cases by the foreign government and not by officials of China. This opinion evidently regards the treaty as mandatory on this point, and suggests no alternative under which such an applicant for admission might properly produce either the certificate of consular officials of China or the certificate of the foreign government. I concur in this reasoning and conclusion. There is no fundamental inconsistency or repugnancy between the act and the treaty, nor between the opinions of my predecessors considering them respectively, nor has any radical change in procedure resulted from the partial modification of the act by the treaty. The certificate is the same in its contents and incidents, but the source from which it issues in the case which we are considering has been transferred from the Chinese Government to the foreign government of residence. The whole scope of the question may be summarized as follows:

Chinese subjects of the permitted classes coming into the United States from China must produce the certificate of the Government of China, and coming from other foreign countries, in which they are residents, must now produce, under the treaty of 1894, the certificate of the government of such

countries, and not, as under the act of 1884 (as considered in 20 Opin. 693), the certificate of consular or other proper officials of China. It lies beyond our inquiry, as I have intimated, to determine whether, granting that under the act of 1884 the certificate of a Chinese person being the subject of another foreign government must be issued by that government when he comes from its jurisdiction into the United States, it should be issued by that government or by the government of residence when he resides elsewhere and proceeds therefrom to the United States. To such Chinese persons the treaty of 1894 does not legally extend, and it has not been determined, so far as I am aware, whether as to them the test of relation as subject or citizen indicated by the act of 1884 or the test of residence by an equitable application (so to speak) of the principle of the treaty is to be invoked. It may be that this latter question is not of practical moment at present, or that you have already in the regulations and practice of your Department disposed of it.

I therefore respond to your request by stating that, in my opinion, there is no authority to be derived from our existing laws granting to consular officers of China in a foreign country the right to issue the certificates prescribed by section 6 of the act of July 5, 1884.

Very respectfully,

JAS. E. BOYD,
Acting Attorney General.

These opinions hold clearly that Section 6 of the Act of July 5, 1884, used the word "subject" as describing the relation of one who owed permanent allegiance by birth or naturalization as distinguished from temporary allegiance resulting from residence or domicil. In a letter of November 7, 1898, from Mr. Wu, the Chinese Minister at Washington, to Mr. Hay, the Secretary of State, it was said, referring to the opinion of Acting Attorney General Boyd (Foreign Relations, 1899, pp. 190–191):

> The Acting Attorney General appears to have based his opinion, not upon any law passed by the lawmaking power of the United States, but upon Article III of the treaty between China and the United States signed March 17, 1894. It is admitted that previous to the conclusion of that treaty, and for some time after the date of that treaty, it was held that under the laws now, as then, in force on this subject, the certificate of the Chinese consul in the foreign country was a compliance with section 6 of the act of 1884. This is forcibly stated by your predecessor, the Hon. Richard Olney, when acting as Attorney General, and I am not aware that he changed his opinion after he became Secretary of State.
>
> It is now contended that section 6 of the law was modified by the ratification of the treaty because of this provision in its Article III: "To entitle such Chinese subjects as are above described to admission into the

United States they may produce a certificate from their Government *or the government where they last resided*, viséed by the diplomatic or consular representative of the United States in the country or port whence they depart." Section 6 of the law provided that in all cases the Chinese Government (through its consul duly empowered) should issue the certificate to *Chinese subjects* residing in foreign countries; and that only in cases where Chinese had become *naturalized subjects* of the foreign country was the government of that country to issue the certificate. Such was the legislative requirements enacted under the treaty of 1880, but it was found in practice that this requirement worked hardships, for there were considerable numbers of Chinese subjects residing in countries where there were no Chinese consuls. Hence, when the unratified treaty of 1888 was framed, it was agreed that this inconvenience should be overcome by authorizing, in the alternative, the issuance of such certificates by the Chinese consul as was then permitted by existing law or by the government of the foreign country where they (the Chinese) resided, and for that purpose the clause above quoted was inserted in Article III of that treaty, which was textually readopted and inserted in the treaty of 1894.

That such was the intention of the American as well as of the Chinese negotiators of the treaties is made manifest by the action of the Secretaries Bayard and Gresham. After the ratification by the Senate of the United

States of the treaty in 1888, a bill was introduced in Congress, doubtless at the instance of Secretary Bayard, and passed by that body, for the purpose of putting the treaty in operation, in which section 6 of the law of 1884 was reenacted almost literally, with the clause relating to the admission of Chinese other than laborers, who were required to "first obtain the permission of the Chinese Government or other government of which they may at the time be a citizen or subject." Certainly if Secretary Bayard understood Article III of the treaty to require all Chinese residing in foreign lands to obtain a certificate from the government where they resided, and not from the Chinese Government through its consul, he would have seen that such requirement was inserted in the law. So also it will be noted that after the treaty of 1894 was ratified a bill to carry it into operation was introduced in the Senate (No. 2309, 53d Cong. 2d sess.), which provided that section 6 of the act of July 5, 1884, was to be reenacted. The bill, I am informed, did not become a law because it was held that the treaty did not repeal or affect the existing laws, which was an additional evidence that Article III did not modify section 6.

Moreover, Article III does not bear the narrow sense which it is attempted to put to it. It does not mean that, in the case of Chinese subjects resident in a foreign country, a certificate issued from that country only and no other can be sufficient; for if

> that had been the intention of the negotiators of the treaty, they would have made it clear by putting that such Chinese subjects must produce a certificate from their Government or, *if residing in a foreign country*, the government where they last resided, etc. It is plain, therefore, from the natural construction of the sentence that the option is left to such Chinese subjects of obtaining a certificate either from their Government or the government where they last resided. It is one of the rules of interpretation that a right once conferred on a person can not be taken away by implication without express and unequivocal provisions to that effect, much less by a narrow and one-sided construction, as it is attempted in the case under consideration; and, with all due deference to the Acting Attorney General, I respectfully submit that his ruling should not be followed.

While the treaty of 1894 seems to have authorized the use of Section 6 certificates issued by foreign countries in which Chinese subjects were domiciled, Mr. Wu seems to have made a persuasive argument that the treaty, while in effect, permitted Chinese subjects domiciled abroad outside of China to produce such certificates, but left them the option of presenting certificates from the Chinese Government. This question aside, the opinions and diplomatic correspondence show the understanding of this Government and of the Chinese Government and of the Department of State and the Department of Justice that Section 6 of the Act of July 5,

1884, required Chinese nationals domiciled in foreign countries other than China to present certificates from their own Government or its authorized representatives, and that the word "subject" in this Act was used to describe those owing permanent allegiance to a government by birth or naturalization as distinguished from temporary allegiance through domicil.

While the convention of 1894 remained in effect, certificates from the government of residence were accepted. The treaty of 1894 by its own terms continued for only 10 years and was not renewed. It affected the operation of Section 6 of the Act of 1882, as amended, only during that period. When the treaty expired by limitation, Section 6 of the Act of 1882, as amended in 1884, again became operative. (For legislation extending the operation of this statute see the Appendix hereto, page 55.) The permission given by the treaty of 1894 to use certificates from the government of residence was thus withdrawn, and a certificate from the government of which the Chinese was a subject required by the Act of 1884 and permitted (we think with Mr. Wu) by the convention of 1894 was then necessary. Thereupon, on April 15, 1905, a consular instruction was issued by the Secretary of State (MS. Instructions to Diplomatic and Consular officers, Vol. 6), which read as follows:

> Under the convention of December 8, 1894, between the United States and China, Chinese persons of the exempt class were ad-

> mitted to this country by a certificate issued by the government of which they were subjects or the government where they last resided. This convention expired by limitation December 8, 1904, and section 6 of the act of Congress approved July 5, 1884, is the law now in force relating to the admission to this country of Chinese persons of the exempt class. * * * The only persons at present authorized to issue certificates to Chinese subjects are the superintendents of customs (taotai) located within the Empire of China. A Chinese person who is by birth or naturalization a subject of some other country can obtain his certificate only from the government to which he owes his allegiance.

In passing, attention is called to the Act of May 5, 1892 (c. 60, 27 Stat. 25; U. S. C., Title 8, Sec. 285), which in Section 2 provided that Chinese persons, or persons of Chinese descent, when adjudged not entitled to remain in the United States, should be removed to China, unless they make it appear that they "are subjects or citizens of some other country."

On May 3, 1905, there were issued by the Department of Commerce and Labor, Chinese exclusion regulations, which contained the following rule:

> Rule 33. The officers whose titles are given below have been authorized by their respective Governments to issue to Chinese *subjects, or citizens* of such Governments the certificates prescribed by section 6 of the act

approved July 5, 1884. Until other officers are designated by foreign Governments only certificates issued by those named shall be accepted as conforming to the requirements of law; and Chinese persons of the exempt classes coming from countries which have not designated officers to issue such certificates to Chinese *subjects*, or *citizens*, thereof can not be admitted to the United States.

The list of officers mentioned in this rule discloses no officers of the Chinese Government authorized to issue certificates outside of China. The regulations of February 5, 1906, issued by the Department of Commerce and Labor, contained Rule 30, which was identical with the first sentence of the above-quoted Rule 33 of 1905; and in it, again, the list of officers authorized by their respective governments to issue Section 6 certificates contained no Chinese officers outside of China. The regulations issued by the Department of Commerce and Labor under date of February 26, 1907, contained again Rule 30, identical with the first sentence of Rule 33 of 1905. Here, for the first time, the list of officers designated by their respective governments to issue Section 6 certificates included Chinese diplomatic or consular officers in countries foreign to China. This regulation is set forth in the appendix hereto (p. 57). The regulations issued by the Department of Commerce and Labor on April 18, 1910, contained, in Rule 10, a regulation the same as the first sentence of Rule 33 of 1905, above quoted. It also contained a list of Chinese officers in countries

foreign to China authorized to issue Section 6 certificates. The regulations of 1910 contained also the following:

> Rule 11. (*a*) Chinese persons of the exempt classes who are citizens or subjects of other insular territory of the United States than the Territory of Hawaii shall, if they desire to go from such insular territory to the mainland or from one insular territory to another, comply with the terms of section 6 of the act approved July 5, 1884. The certificate prescribed by said section shall be granted by officers designated for that purpose by the chief executives of said insular territories, and the duties thereby imposed upon United States diplomatic and consular officers in foreign countries in relation to Chinese persons of the said classes shall be discharged by the officers in charge of the enforcement of the Chinese exclusion acts at the ports, respectively, from which any members of such excepted classes intend to depart from any insular territory of the United States: *Provided, however,* That the privilege of transit shall be extended to all persons other than laborers, as provided in Rule 18.
>
> (*b*) As *all persons* who were citizens of the Republic of Hawaii on August 12, 1898, are citizens of the United States, persons of the Chinese race claiming such status may be admitted at either mainland or insular ports of entry upon producing evidence sufficient to establish such claim. *Subjects of the Chinese Empire of the exempt classes residing*

in Hawaii must obtain certificates from the representative of their own Government (the Chinese consul, Honolulu), and such certificates must be visaed by the inspector in charge of the immigration service in said islands instead of by a diplomatic or consular officer.

(*c*) The governor of the Philippine Islands having, by executive order No. 38, of September 23, 1904, designated the collector of customs, Manila, to *issue* to Chinese citizens of those islands the certificate provided by section 6 of the act of July 5, 1884, and it being impracticable to require that such certificates shall be viséed, officers at ports of entry for Chinese will regard certificates issued to such Philippine citizens in the same manner as certificates issued by officials of foreign countries and viséed by American diplomatic or consular officers. Certificates issued by the Chinese consul-general, Manila, to *subjects of the Chinese Empire* residing in the Philippines will be viséed by the collector of customs at Manila, and when so viséed will be accorded the usual consideration. (Italics ours.)

This is a clear declaration that subjects of the Chinese Empire residing outside of China must obtain certificates from officers of their own government. This regulation of 1910 was repeated in the editions of 1911 and 1912 and in the regulations of the Department of Labor approved January 24, 1914, October 15, 1915, October 27, 1916, and May 1, 1917, and in the edition of October, 1920, and in the

last edition, containing the rules of October 1, 1926, the latter containing an extended list of countries other than China in which Chinese officials have been designated by the Government of China to issue Section 6 certificates to Chinese nationals residing in other countries than China. It is to be noted that in the rules issued by the Department of Labor approved January 24, 1914, and those thereafter issued, the phrase "citizens of the Chinese Republic" is substituted for the phrase "subjects of the Chinese Empire" appearing in the earlier editions, showing that the word "subject" was used in connection with a monarchy or empire, as the word "citizen" is used in relation to a republic, and as describing the relation of one who owes permanent allegiance by birth or naturalization.

Many other instances of practical construction might be cited. We have found only one which, in the slightest degree, breaks the clear consistency and continuity of the practical construction recounted.

Under date of May 5, 1908, the State Department approved and issued for the use of diplomatic officers of the United States a digest of the treaty, laws, and regulations governing the admission of Chinese, prepared by Mr. Frederick D. Cloud, American Vice Consul General at Shanghai. This digest, referring to Section 6 of the Act of July 5, 1884, said:

> According to the stipulations of the above statute every Chinese person, other than a

> laborer, entitled to enter the United States, must, before proceeding to the United States, obtain a certificate from a properly authorized official of the government under which the applicant *is domiciled*, and which said certificate must be duly examined or viséed by the consular representative of the port or district from which the person named in the certificate is about to depart. (Italics ours.)

This inaccuracy may be explained by the fact that the convention of 1894, becoming inoperative in 1904, authorized certificates from the government of domicil or residence, and the author of this digest may have overlooked the fact that the use of such certificates had expired with the expiration of the treaty. Under the circumstances, this statement is of little significance, especially as the digest refers later to the Chinese officers in countries foreign to China, authorized to issue certificates under Section 6, and shows a loose treatment of the subject.

The foregoing review shows that the practical construction by the President of the United States, the Department of State, the Treasury Department, the Department of Justice, and the Department of Labor has consistently adhered to the view for nearly forty-three years that the word "subject" as used in Section 6 of the Act of 1884 is used in its primary and accurate sense to denote one who by birth or naturalization owes permanent allegiance to the government in question, and that a native-born

Chinese who has retained his permanent allegiance to the Government of China and who has never been naturalized in a foreign country is a subject of China within the meaning of the Act, and not of the nation in which he may have maintained a domicil or conducted a business.

The conclusion reached by the Circuit Court of Appeals rejects the ordinary meaning of the word "subject," adopts a construction which is out of line with the purpose of the Act and causes confusion in its application, and is contrary to the established practice and understanding of the officers of the Government of the United States who have been charged with the enforcement of this Act.

The judgments of the Circuit Court of Appeals should be reversed and those of the United States District Court affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
O. R. LUHRING,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.
F. M. PARRISH,
Attorney.

NOVEMBER, 1927.

APPENDIX

LEGISLATIVE HISTORY OF THE ACT OF 1884

In reporting out the bill which ultimately became the Act of 1884, the majority report of the Committee on Foreign Affairs of the House stated (H. Rep. 614, 48th Cong., 1st Sess.):

> This act, prepared by the combined representatives of three States and two Territories, the portions of the United States now most affected by Chinese immigration, is presented for the sole purpose of perfecting the machinery of exclusion already in existence under the act of 1882. This act was intended by its originators and supporters to exclude Chinese laborers, coming from any and every port, from our shores.
>
> To show that it has failed so to do your committee have only to cite the decision of Judges Lowell and Nelson, of the United States circuit court in Massachusetts, to the effect that a Chinese laborer, born on the island of Hong Kong after its cession to Great Britain, is not within the provisions of the act of 1882, and the decision of Justice Field, above cited, that such Chinese laborer is within said provisions, to show the necessity of amendment.
>
> Your committee believe that this bill should be enacted into a law, so that hereafter there can be no diversity of opinion as to the full meaning and intent of the act of 1882, and litigation on this subject be brought to an end.

The minority report (idem) contains the following views with respect to the scope of the Act :

> The act of 1882 was entitled "An act to execute certain treaty stipulations relating to Chinese." Of course these treaty stipulations were with China; they did not affect the subjects of England or France, although they might happen to be Chinese; but this amendatory bill boldly supplies the deficiency, if any exists. By referring to section 4 of the bill, we find that the provisions are no longer confined to the treaty stipulations merely, but include the provisions of the acts as well as the stipulations of the treaty. It may accord with the wishes of some members of the House to forbid the half million of English subjects who are of Chinese blood to set foot on our soil, but it would seem to be worthy of serious consideration before such a step is taken whether any exigency has been found to justify it.
>
> * * * * *
>
> But section 6 contains more radical amendments. Under it the Chinese persons who may be entitled "by said treaty or this act" to come within the United States must procure a certificate of permission and identification not only from the Chinese Government, by treaty with which it is claimed we have the right to make these restrictive regulations, but also "of such other foreign Government of which at the time such Chinese person shall be a subject."
>
> This certificate must state the nature, character, and estimated value of the business carried on by the Chinese person applying for it, if he be a merchant. If sought for the purpose of travel for curiosity it must state whether he intends to pass through or travel within the United States, together

with his financial standing in the country whence he comes. If the applicant is coming here to study, the certificate must state the nature and character of the studies and at what place or places he will pursue them, with the probable length of time required for the completion of the same.

These curious provisions suggest the reflection as to just what the English authorities at Singapore or Hong Kong will do if by any chance any Chinese-English subjects in those cities, where they constitute a most intelligent and wealthy portion of the population, should wish to travel in the free republic, or, perchance, to send their sons to be educated in her schools. Would it not be well to consider our ability to enforce such regulations before we enact them into law? It is claimed in some quarters that we are not overzealous in shielding our citizens when amenable to English law. Shall we be more zealous and efficient in enforcing such laws as this against English subjects?

It is perhaps worthy of notice that this section not only attempts to make more stringent restrictive regulations against Chinese laborers, subjects of China, with whom we have some show of right, under a treaty, to make them, and against the Chinese subjects of other nations, with whom we have no such treaty stipulations but that its other provisions unquestionably exceed the scope of the treaty with China.

* * * * *

* * * And, where is the exigency which justifies us in disregarding our treaties with all the other nations among whose subjects are to be found persons of the Chinese race.

When the bill was under consideration by the Committee of the Whole House, Mr. Rice, a member of the Committee which reported the bill, said (Cong. Rec., 48th Cong., 1st Sess., Vol. 15, Part 4, pp. 3756 and 3773):

> No merchant shall come here unless he has obtained permission of the government of which he is a subject, and a certificate from that government stating a great many particulars in regard to him.
>
> * * * * *
>
> But having gone over all that pertains to the old act, let me now come to what is the heart and the kernel of this act. That is all to be found in the fifteenth section of it. I beg the members of this House to listen to this section 15:
>
> "The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or of any other foreign power."
>
> That is the whole substance of this amended act; that is all that is in it, really, that is new or that is not absolutely puerile and frivolous.
>
> "The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or of any other foreign power."
>
> Now, it happens that there are two British provinces in which Chinese dwell. There is the province of Hong Kong, ceded to Great Britain in 1841; its capital, Victoria; population in 1872, Europeans and Americans, 6,000; Chinese, 115,000. There are 115,000 Chinamen that have not been kept out by any act we have adopted heretofore. Singapore was ceded to the British in 1824. Its population in 1871 was 74,000, of whom 54,000

were Chinese. In all nearly 200,000 Chinese who possibly would not be kept out by the act of 1882. Why not? Because it happens that they are subjects of the British Empire and that over them floats the British flag. One of them was let into Massachusetts a few months ago under the decision of Judges Lowell and Nelson that this act of 1882, being entitled "An act to carry out certain treaty provisions with China," did not apply to Chinese who were subjects of Great Britain, with whom we had made no supplemental treaty authorizing us to do any such thing. And therefore a Chinaman got into Boston from Hong Kong, and he is at large somewhere in the country now, and for all I know he is executing a flank movement upon California. * * *

It is to arrest the incursion of such Chinamen that this act is prepared and presented Let me read from the report of the majority to prove this:

To show that it—

This act—

To show that it has failed so to do—

To keep out the Chinese—

your committee have only to cite the decision of Judges Lowell and Nelson of the United States circuit court in Massachusetts, to the effect that the Chinese laborer born on the island of Hong Kong, after its cession to Great Britain, is not within the provisions of the act of 1882.

That is all they have to say. The words are "they have only to cite." So that this is the be-all and the end-all of this matter—to keep out English Chinamen from the United States.

Where are your treaty rights to do that? Did you vote for steel cruisers the other day when you were anticipating the presenting

and putting this bill through the House? How long, think you, England would keep her ironclads from bombarding our cities if you should refuse to her subjects, Chinamen though they are, the right to set foot upon our shores? * * *

* * * * *

I move to amend by striking out of lines 110, 111, and 112 the words "or of such other foreign government of which at the time such Chinese person shall be a subject."

I want to call the attention of the members of this committee to what we are doing at this moment. We are making history, or affording a chance for history to be made, with rather astounding rapidity. We have left the subject of Chinese laborers; they are excluded; every crack and cranny have been stopped.

We are now coming to the question of merchants, travelers, and other persons of the Chinese race, and in this section we are attempting to hinder and impede their coming and going of their own free will and accord, as is provided for in every treaty between this country and China.

More, the words which I moved to strike out also provide that merchants, subjects of other governments than China, but of the Chinese race, shall be hindered and restricted in their efforts to enter this country. Now, that is in direct conflict with our treaties with other nations than China—with Great Britain, with Brazil, with France, if France should obtain Chinese subjects.

Mr. Hitt, also a member of the Committee, said (idem, pp. 3761 and 3762):

But all that I have discussed is the smallest and least important part of this bill.

The essence of the bill, upon which the gentleman from Indiana (Mr. Lamb) in charge of the bill keeps his eye all the way through, is that brief provision in the fifteenth section:

"That the provisions of this act shall apply to all subjects of China, and Chinese whether subjects of China or any other foreign power."

There are many hundred thousands who are Chinese in blood, in language, in race, who are subjects and citizens of various other great powers than China.

We have treaties with them guaranteeing to Americans the right to go and sojourn in their countries, and to their subjects the right to come freely and pass through or reside here. In utter violation of these treaties the bill proposes to exclude Chinese persons who are subjects of any of these great powers, born under their flag, and owing them allegiance.

* * * * * * *

* * * Subjects of all these powers are to be dealt with by this bill. It declares boldly that it applies with its every restriction to them all in spite of treaties, guaranteeing free intercourse and of international law and the sacred faith of the nation.

It is no answer to say that the English themselves in Australia exclude Chinese laborers. This is a provision to harry English subjects and subjects of other governments who are not laborers at all, but travelers and merchants. It is so bald a violation of our treaty obligations with many nations that the case can not be made stronger by any argument than it is by the statement. We have in our treaties declared that all citizens and subjects of these governments should have with respect to the United States the

right of free entry and residence, and we have the "most favored nation" clause in almost every treaty. I have often met at Paris a gentleman of the Chinese race, a distinguished scholar, who is a professor in the most splendid university in Europe. He is a French citizen, has a French wife and family. If he, though a learned man, should think he could instruct himself by listening to the debates of this body, before he could reach Washington he would have to be subjected to all the indignities contemplated by the sixth section of this bill. How long do you think it would be before the French minister would be inquiring at our State Department to know whether French citizens were to be outraged in such a manner; whether all the obligations of treaty and of international law, which is wider and older than treaties, were to be disregarded?

* * *

This bill, the gentlemen from California say, is intended to make law of Judge Field's decision where he held that a British subject of Chinese race and born at Hong Kong, coming to San Francisco, was excluded from landing by the provisions of the act of May, 1882; while Judges Nelson and Lowell, of Massachusetts, held that such a person landing at Boston was not. Gentlemen have spoken of that decision as showing that the law of May, 1882, and the treaty with China cover English subjects; the law carrying out what was the true meaning of the treaty, which they propose now to put beyond doubt. Judge Field says nothing as to the meaning of the treaty. He so construes the law as to find that a British subject was aimed at; but when he comes to the meaning of the treaty he says, that was a question for those who

> voted for the law to decide—and it is for you to-day to pass upon. * * *
>
> It is for us to-day in voting upon this bill to decide whether we will undertake to override that treaty with China and disregard all our other treaties with nations having persons of the Chinese race among their subjects.

Congressman Budd thus explained the scope of the bill (Idem p. 3770):

> Mr. Budd. I desire to state that the object of placing these words in the amendatory act was to provide that this act which is amendatory should not go into operation for ninety days. We have secured under the original act the exclusion of all the Chinese affected by it. But by the bill which is now under consideration we propose to exclude not only the subjects of China but all Chinese, whether the subjects of that or any other power. We make other limitations and restrictions. We require other necessary descriptions in the certificate; and unless we allow ninety days any of these people coming here with a certificate under the old act would be turned back—an act of injustice we do not desire to inflict.

LEGISLATION EXTENDING ACT OF 1882

Section 1 of the Act of May 6, 1882 (c. 126, 22 Stat. 58; U. S. C., Title 8, Sec. 263), provided that:

> * * * until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended * * *.

The Act of May 5, 1892 (c. 60, 27 Stat. 25), provided in Section 1:

> That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.

That operated to keep Section 6 in effect until May 5, 1902.

The Treaty of 1894 with China then intervened. It allowed certificates to be issued to Chinese nationals by the government of their residence. The better view is that this was permissive, not mandatory, and that the provision of Section 6, allowing Chinese nationals residing abroad to use certificates from the Chinese Government, remained in effect. A treaty is not construed to repeal a statute by implication if it may be avoided. (*United States* v. *Lee Yen Tai*, 185 U. S. 213.)

On April 29, 1902, a few days before Section 6 of the Act of 1882, as amended, would otherwise have ceased to operate, an Act was passed (c. 641, 32 Stat. 176), which in Section 1 provided:

> That all laws now in force prohibiting and regulating the coming of Chinese persons, and persons of Chinese descent, into the United States, * * * are hereby, re-enacted, extended, and continued so far as the same are not inconsistent with treaty obligations, until otherwise provided by law, and said laws shall also apply to the island territory under the jurisdiction of the United States * * *.

This evidently related to laws in the form of statutes, not those in the form of treaties. It could not have been intended to extend beyond the period provided therein the operation of the Chinese treaty

of 1894, which allowed certificates from the government of residence. It kept in force that provision of Section 6 relating to certificates to Chinese subjects from the Chinese Government. If that had been repealed by the convention of 1894, as Acting Attorney General Conrad held, some difficulty would exist in saying it was in force in 1902 and extended by the Act of 1902, and that is why we prefer the view of Mr. Wu that the treaty of 1894 permitted certificates for Chinese nationals from the government of their residence but also allowed them to use certificates from the Chinese Government. At any rate, it has always been understood that Section 6 of the Act of 1882, as amended in 1884, became operative when the treaty of 1894 expired. If it did not, we now have no provision on the statute books requiring any certificates.

For history of Chinese exclusion legislation see Moore, International Law Digest, Vol. IV, p. 187.

RULE 30 OF REGULATIONS GOVERNING ADMISSION OF CHINESE ISSUED BY THE DEPARTMENT OF COMMERCE AND LABOR ON FEBRUARY 26, 1907

30. The officers whose titles are given below have been authorized by their respective Governments to issue to Chinese subjects or citizens of such Governments the certificates prescribed by Section 6 of the act approved July 5, 1884.

Brazil: Chiefs of police, or corresponding officers in the municipalities and civil subdivisions.

Canada:

Vancouver—Collector of customs.

Victoria—Collector of customs.

Ottawa—Chief controller of Chinese, or chief clerk in the department of trade and commerce.

China:

In Chinese Empire—

Acting viceroy of Hu Kuang (Hunan and Hupeh).

Acting viceroy of Sze Ch'uen.

Acting viceroy of Liang Kuang (Kuang-tung and Kuanghsi).

Tartar-general of Fu-chou and customs superintendent of Fu-k'ien.

Governor of Anhui.

Governor of Hunan.

Governor of Shantung.

Governor of Kiangsi.

Customs taot'ai of Tientsin.

Taot'ai of the Hui-Ning- Ch'ih-T'ai-Kwang circuit.

Taot'ai of the Hang-Chia-hu circuit.

Taot'ai of the Hsing-Ch'uan-yung circuit.

Acting taot'ai of the Ning-Shao-T'ai circuit.

Taot'ai of the Wen-Ch'u circuit.

Taot'ai of the Wue-Ch'ang-Li circuit.

Taot'ai of the Teng-Lai-Ch'ing circuit.

Taot'ai of the Su-Sung-T'ai circuit.

In the countries foreign to China—

Austria-Hungary—Chinese minister or chargé d'affaires, Vienna.

Belgium—Chinese minister or chargé d'affaires, Brussels.

Cuba—Chinese minister or chargé d'affaires, Habana.

England—Chinese minister or chargé d'affaires, London.

France—Chinese minister or chargé d'affaires, Paris.

Germany—Chinese minister or chargé d'affaires, Berlin.

Hawaii—Chinese consul, Honolulu.

Italy—Chinese minister or chargé d'affaires, Rome.

Japan—Chinese minister or chargé d'affaires, Tokyo; Chinese consul-general, Yokohama.

Korea—Chinese consul general, Seoul.

Mexico—Chinese minister or chargé d'affaires, Mexico City.

Netherlands—Chinese minister or chargé d'affaires, The Hague.

Peru—Chinese minister or chargé d'affaires, Lima.

Philippine Island—Chinese consul general, Manila.

Portugal—Chinese minister or chargé d'affaires, Lisbon.

Russia—Chinese minister or chargé d'affaires, St. Petersburg.

Siberia—Chinese commercial agent, Vladivostok.

Spain—Chinese minister or chargé d'affaires, Madrid.

Straits Settlements—Chinese consul general, Singapore.

Transvaal—Chinese consul general, Johannesburg.

Cuba: Chief of immigration department.

Dutch Guiana. (*See* Surinam.)

German protectorate of Kiautschou: Commissioner for Chinese affairs to the government, civil commissioner, or oberrichter.

Guatemala: Minister of foreign affairs or subsecretary of state.

Hong Kong: Registrar general.

Jamaica: Deputy inspector general of police.

Japan:

Governor of any fu (district) or ken (Prefecture).

Hokkaido—Governor general.

Formosa—Chief of prefecture having jurisdiction.

Macau, Portuguese province of: Secretary general.

Mexico: Department for foreign affairs.

Philippine Islands: Collector of customs.

Society Islands: Commissioner of police of the municipality of Papeete, Tahiti.

Straits Settlements: Colonial secretary.

Federated Malay States—Colonial secretary, federal secretary, or secretary for Chinese affairs.

Surinam (Dutch Guiana): Government's secretary, or secretary ad interim at Paramaribo.

Trinidad: Governor.

Venezuela: Mayors of cities or governors of provinces.

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[redacted]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

Nos. 115-116

JOHN D. NAGLE, as Commissioner of Immigration at the port of San Francisco,
Petitioner,

vs.

LOI HOA.
Respondent.

JOHN D. NAGLE, as Commissioner of Immigration at the port of San Francisco,
Petitioner,

vs.

LAM YOUNG, for and on behalf of Phuong Con,
Respondent.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

The petitioner having appealed from the decision of the Circuit Court of Appeals for the Ninth Circuit

praying for the issuance of a writ of certiorari in the above entitled matter, and the same having been granted, respondent Loi Hoa presents herewith his statement and argument.

On appeal from the decision of the District Court the above entitled cases were consolidated by the Circuit Court of Appeals for the Ninth Circuit and it was therein stipulated by and between the appellant and appellee that the brief filed in the case of Loi Hoa might be considered in deciding the companion case, Phuong Con, as the points involved are identical.

The respondent, Loi Hoa, a Chinese person, 26 years of age, arrived at San Francisco October 31, 1925, and applied for admission as a Section 6 Saigon French Indo-China merchant, doing business at Cholon in said colony. Upon his arrival he presented a Section 6 certificate in the usual form, issued to him by the government of French Indo-China, and bearing the usual certificate of investigation and visa of the American Consul at Saigon, French Indo-China. He also presented a French Colonial passport issued by the said government. The record shows that the respondent attended school in a village near his home village in China until he was about 20 years of age in 1919, when he went to Cholon and became a member of his present firm. The Department of Labor denied him admission to the United States on the ground that he had not submitted a Section 6 certificate issued by the government to which he owed allegiance and of which he was a citizen or subject. The Section 6 certificate presented by the respondent

is in proper form, complies with all the requirements of the statute and contains all of the information required by law to be furnished in such cases. (Section 6 of the Act of 1882 as amended by the Act of July 5, 1884, 23 Stat. L. 115.) It contains the usual certificate of the American Consul that he has made an investigation of the statements therein contained and that the same are true. It also bears the usual visa of the American Consul as required by said Section 6. It also bears a visa of the American Consul classifying the respondent under the Immigration Act of 1924 as a non-immigrant, Section 3 (6) Class Treaty of Commerce and Navigation. (C. 190, 43 Stat. 153.)

The respondent, as defined under the immigration Act of 1924 and as construed by the Supreme Court in the recent case of *Chung Sum Shee et al. v. Nagle* (268 U. S. 336), is a non-immigrant, and the said law does not require such a person to procure a visa in addition to that required under other existing laws. The respondent presented the documents required by law to show that he is and has been a merchant for about six years and since the time he was about 20 years of age, and we submit that the right to admission as a Section 6 merchant is conclusively settled by recent judicial decisions, provided that the Section 6 certificate was executed by proper authority. The respondent's Section 6 certificate was issued by proper authority.

TREATY AND STATUTES INVOLVED.

Article II of the Treaty between the United States and China of November 17, 1880 (22 Stat. 826), provides:

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

Act of May 6, 1882, as amended and added to by Act of July 5, 1884, 23 Stat. L. 115, reads as follows:

> "An act to amend an act entitled: 'An act to execute certain treaty stipulations relating to Chinese, approved May sixth, eighteen hundred and eighty-two' ".

Section 6 provides:

> "That in order to the faithful execution of the provisions of this act, *every Chinese person*, other than a laborer, *who may be entitled by said treaty or this act* to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, *or of such other foreign government of which at the time, such Chinese person shall be a subject, in each* case to be evidenced by a certificate issued *by such government.* * * *"
> (Italics ours.)

ARGUMENT.

The law could not well be more explicit to show that a foreign government other than the Chinese government has authority under said Section 6 to issue certificates to Chinese persons who "at the time" may be a subject of or domiciled in such other foreign country. In fact, Rule 10 of May 1, 1917, and Rule 11 of October 1, 1926, of the Rules Governing Admission of Chinese, promulgated by the Department of Labor, concedes this fact by designating a number of foreign countries other than China, or Chinese officials, who are authorized to issue such certificates, the government of French Indo-China being one so designated.

Rule 11, Subdivision 2, provides as follows:

> "The officers whose titles are given below have each been authorized by his respective Government to issue to its citizens or subjects the certificates prescribed by section 6 of the act approved July 5, 1884:
>
> * * * * * * *
>
> French Indo-China:
>
> Annam—Administrateur des services civils et directeur des bureaux de la residence superieure (civil service administrator and director of the bureaus of the governor's mansion), at Tonkin.
>
> Cambodia—Administrateur des services civils, directeur des bureaux du Gouverneur de la Cochin-China (civil service administrator and director of the bureaus of the Governor of Cochin-China).
>
> Cochin-China—Administrateur des services civils, directeur des bureaux du Gouverneur de la Cochin-China (civil service administrator and director of the bureaus of the Governor of Cochin-China); chief of the immigration service.

Tonkin—Administrateur de services civils et directeur des bureaux de la residence superieure (civil service administrator and director of the bureaus of the governor's mansion.)

* * * * * * *"

The respondent's Section 6 certificate was signed by the Chief of the Immigration Service of the government of French Indo-China and it appears in the body of said document that he "has been designated for that purpose by the government of French Indo-China, and that the detained, in the language of the statute, has the permission of said government to go and reside within the territory of the United States after an investigation and verification by the United States in this country." In addition, the official character of said certificate is authenticated by the American Consul at Saigon, French Indo-China, who certifies that:

> "This certificate was originally signed by the Chief of the Immigration Service of Cochin-China delegated by the Governor General of Indo-China to sign Chinese certificates in Cochin-China."

There is no room to question the fact that the issuance of said certificate to the respondent was the act and deed of the French Indo-China government.

We understand that the petitioner does not now contend that the certificate was not the act of the French Indo-China government and that the regularly constituted officers issued the same, but that the respondent being a citizen of China, the proper official should have been one designated by the Chinese government to pass upon and issue said certificate.

The respondent's contention is that although he is a citizen of China and has never become a citizen of French Indo-China, or any other country, he, nevertheless, being a bona fide resident merchant domiciled in French Indo-China, the said government was the proper authority to issue said certificate, especially in view of the fact that the Chinese government has never authorized any person nor any official representative to issue Section 6 certificates to citizens of China residing in French Indo-China.

The Chinese Exclusion Laws, Act of May 6, 1882, (c. 126, 22 Stat. 58) as amended by the Act of July 5, 1884, (c. 220, 23 Stat. 115) and continued in force indefinitely by the Acts of April 29, 1902 (c. 641, 32 Stat. 176) and of April 27, 1904, (c. 1630, 33 Stat. 394, 428) clearly recognize the fact that there are Chinese subjects temporarily residing in foreign countries other than China who may desire to come to the United States, and for their accommodation and to facilitate the procurement of the necessary documents they are permitted to secure the required certificates granting permission to come to this country from the foreign government where they may be "at the time" residing. In many instances it would be impossible for Chinese persons residing in such other foreign countries to secure such certificates from the Chinese government for the reason that said government has no official representatives in such country and no facilities for making the investigation required by law, and hence, the law provides for the issuance of such certificates by foreign governments other than China. That this is the correct interpretation of the

law is also shown by the fact that Section 6, supra, further provides:

> "That such certificates may be visaed by the endorsement of the diplomatic representatives of the United States in the foreign country through which certificate issues or of the Consular representative of the United States at the port or place through which the person named is about to depart."

A review of the history of this legislation indicates that Congress intended to allow Chinese citizens, no matter where they might be domiciled, the same rights and privileges under the treaty of 1880 between the United States and China that obtain if domiciled in China. The Act of May 6, 1882 (22 Stat. 58), Section 6, is as follows:

> "That in order to the faithful execution of articles I and II of the Treaty in this Act before mentioned, every Chinese person other than a laborer, who may be entitled by said Treaty, and this Act to come to the United States, shall be identified as so entitled by the Chinese government in such case, such identity to be evidenced by a certificate issued under the authority of the said government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English stating such right to come, and which certificate shall state the name, title or official rank, if any, the age, height and all physical peculiarities, former occupation or profession and place of residence in China, of the person to whom the certificate is issued, and that such person is entitled, conformably, to the Treaty in this Act mentioned, to come within the United States. * * * "

After the passage of this Act and in the month of August, 1882, one Low Yam Chow, a Chinese person, citizen of China, and merchant from Panama, arrived at the port of San Francisco and made application for admission. He was denied admission on the ground that he did not possess a certificate of identification, etc., required by the aforesaid Act of May 6, 1882 (22 Stat. 58). The matter was taken into court on habeas corpus and the detained was discharged. (*In re Low Yam Chow on Habeas Corpus*, 13 Fed. 612.) Judge Hoffman stated the case as follows:

> "Referring to the terms of Section 6, which have been cited, it will, we think, be apparent that the persons contemplated in its provisions are Chinese merchants, etc., coming *from China* to the United States and not Chinese merchants coming to this country from other parts of the world. The certificate is to be furnished by the Chinese government or under its authority. It must state the name, age, height and all physical peculiarities, former and present occupation, and place of residence in China, of the person to whom it is issued. How could a Chinese merchant who has resided maybe for ten or twenty or thirty years in London or Calcutta, or Callao or Panama, obtain such a certificate? Certainly not without going to China for that purpose, and how, if he should revisit his country with that object, could the certificate state as required, *his place of residence in China?*" (Italics ours.)

Circuit Justice Field, reviewing the same case September 5, 1882, 13 Fed. 605, in a lengthy opinion to which this Court's attention is particularly called, held that the section requiring a certificate for Chinese merchants coming to the United States does not apply to those who resided out of China on the passage of

the Act of Congress, and the proof of their occupation could be made by parol. In other words, a Chinese applicant for admission to the United States claiming to be a merchant, coming from any country foreign to China, could be admitted without a Section 6 certificate on the mere furnishing of parol evidence as to his status.

In order to correct this situation Congress amended Section 6 of the Act of 1882 by the enactment of July 5, 1884 (23 Stat. 115) supra. This amendment was intended to compel every Chinese merchant seeking admission to present a Section 6 certificate issued either by the government of China or the government of the country where the merchant last resided. That the government intended and placed this construction upon this statute is further shown by the Treaty of December 8, 1894, (28 Stat. 1210) between China and the United States. Article III provides that: "Chinese subjects being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers," when seeking admission into the United States, "may produce a certificate from their government or the government where they last resided." This Treaty was in existence for ten years and it is reasonable to suppose that the adoption of this self executing treaty was in conformity with and intended to carry out the amendment of July 5, 1884. (23 Stat. 115, supra.)

The government contends that the word "subject" as used in Section 6 of the Act of July 5, 1884, supra, means either a native born or naturalized citizen of the country issuing said certificate. If this is the

proper construction, then it is apparent that many Chinese merchants residing in countries foreign to China would never be able to visit the United States and would receive no benefit from the Treaty existing between the United States and China.

The Exclusion Law (Section 6) provides that said certificate may be issued by "such other foreign government of which *at the time* such Chinese person *shall be a subject.*" The word "subject" is preceded by "at the time," clearly showing that this clause has reference to Chinese persons who are merely *temporary* "subjects" of some other foreign country, but are actually Chinese subjects. In other words, if the clause had application to Chinese persons *who are natives* of, or *owe permanent allegience* to some foreign government other than China, the clause would doubtless have read: "such other foreign government of which such Chinese person shall be a subject," omitting the words "at the time," which clearly shows that they have reference to a temporary residence or allegiance.

It must be remembered that the Treaty was with China and was intended to apply to all Chinese subjects whether residing in China or some other foreign country as is stated in the opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case, (page 21 of the record in the Loi Hoa case) which is as follows:

> "Appellants contend that the word 'subject' as used in the Exclusion Act means one who is resident in or domiciled in 'such other foreign' country, and they find support of that construc-

tion in the words 'of which at the time.' We think the contention must be sustained. The treaties with China and the statutes enacted in pursuance thereof were obviously intended only for the benefit of American citizens and Chinese subjects. To become subjects of Indo-China so as to owe allegiance to the government thereof these appellants would have been required to renounce their allegiance to the country in which they were born, and all rights which they theretofore had as subjects of China. We think it inconceivable that either by the United States or by China the benefits of the treaty here involved were intended to be extended to subjects of other nations.

This reasoning is rejected by the Department of Labor for the reason, it is said, 'that Chinese may, if they so desire, become citizens or subjects of other nations by naturalization,' and thus obtain certificates under Section 6. But it is not to be supposed that in entering into the treaties with the United States the Chinese Government had in mind the protection of Chinese who had transferred their allegiance to other countries and had ceased to be Chinese subjects. This is denied by the very terms of the treaties. In the Treaty of November 17, 1880, it was declared that the purpose thereof was to promote commercial relations 'between the citizens and subjects of the two powers.' And in the treaty of March 17, 1894, it was recited that the purpose was 'to protect the citizens or subjects of each within the jurisdiction of the other.' And it is significant as expressing the understanding of the high contracting parties that in that treaty, which was in force for a period of ten years, it was expressly provided that in order that Chinese merchants and others of the favored class might be admitted to the United States, they might produce a certificate from their government, 'or the government where they last resided'."

The "subject" of a country is not exclusively or necessarily a native born or naturalized citizen owing permanent allegiance to such country. As was said by the Supreme Court in the case of *The Pizarro,* 2 Wheat. (U. S.) 227, 245, 4 L. ed. 226, 231:

> "As to the second objection, it assumes, as its basis, that the term 'subjects,' as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to effectuate this object, the term 'subjects,' when applied to persons owing allegiance to Spain, must be construed in the same sense as the term 'citizen' or 'inhabitants' when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction is, that in the 18th article of the treaty, the term '*subjects,*' '*people,*' and '*inhabitants,*' are indiscriminately used as *synonymous* to designate the same persons in both countries, and in cases obviously within the scope of the preceding articles.
>
> Indeed, in the language of the law of nations, which is always to be consulted in the interpretations of treaties, *a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country while he resides in it; temporarily, indeed,* if he has not, by birth or naturalization contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace."

See also the case of *Carlisle v. U. S.,* (83 U. S. 147, 21 L. ed. 426, 429), to the same effect, and where it is

said that an alien whilst domiciled in a foreign country owes a local and temporary allegiance to such country which continues during the period of his residence, and he may be punished for treason or other crimes the same as a native born subject might be; he is a "subject" of the country where he resides, although he may be only a temporary subject of that country.

That this is the correct interpretation of the term "subject" as used in Section 6 supra, is further emphasized by the provision heretofore referred to contained in Article III of the treaty of 1894, supra, between the United States and China, which permitted Chinese subjects to "produce a certificate from their government or the government where they last resided".

It is conceded by the petitioner that the official who issued the Section 6 certificate to the respondent was duly authorized to do so by the French Indo-China government. (Original immigration record Exhibit "A", page 35.) It is also conceded that the Chinese government has never authorized any person to issue Section 6 certificates to citizens of China residing in French Indo-China. The respondent therefore applied to the French Indo-China government and was after investigation by the proper officials of said government, and further investigation by the appropriate Consular representative of the United States and visaed by him, given a Section 6 certificate.

It appears from the brief of the Solicitor General that he thinks the question here involved is an entirely new one, and that there is a danger of an influx of Chinese immigration if this Court should sustain

the decision of the Circuit Court. As a matter of fact there are very few Chinese applicants for admission to the United States from countries foreign to China, and even from China itself, and the Chinese population is dwindling under Bureaucratic interpretation and enforcement of the immigration and exclusion laws. It is apparent if at all necessary that this is a question for legislative consideration.

All laws are to be construed as to avoid an unjust or absurd conclusion, and general terms are to be so limited in their application as not to lead to injustice, oppression or an absurd consequence.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be sustained.

Dated, San Francisco,
November 25, 1927.

Respectfully submitted,

GEORGE W. HOTT,
JOSEPH P. FALLON,
Attorneys for Respondent.